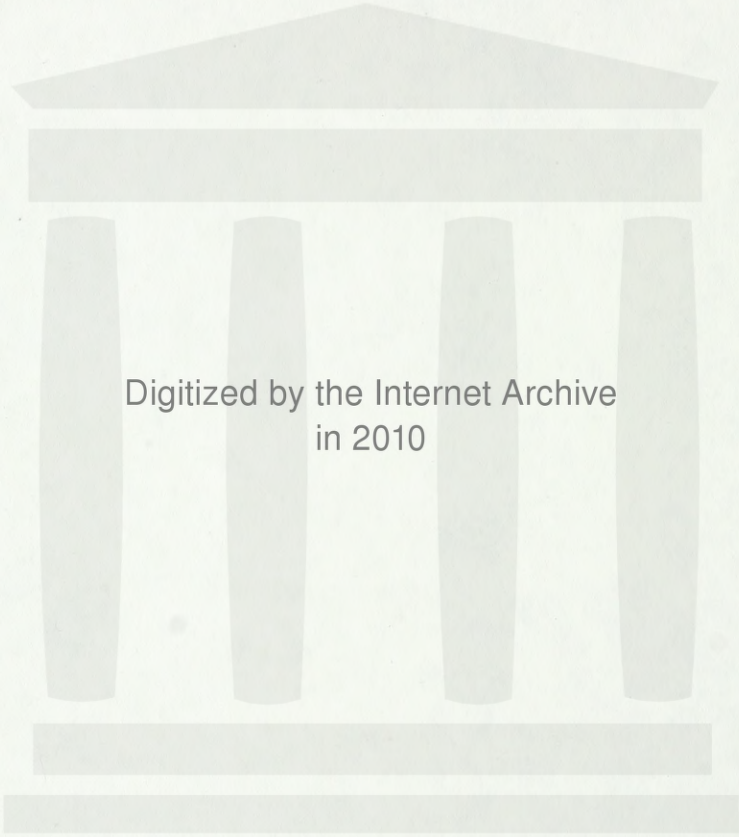
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Decisions of The Comptroller General of the United States

VOLUME 62

OCTOBER 1, 1982 TO SEPTEMBER 30, 1983

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GENERAL ACCOUNTING OFFICE

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COMPTROLLER GENERAL OF THE UNITED STATES

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Compiled in the

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Legal Information and Reference Service Branch

Index-Digest Section

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Preface

This volume is the sixty-second in a series of annual volumes entitled "Decisions of the Comptroller General of the United States," which has been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S. Code 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions on the validity of contract awards are rendered to interested parties.

The decisions included in these volumes are presented in full text and represent about ten percent of the total number rendered annually. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the Government or the private sector; whether the decision modifies, clarifies, or overrules the findings of prior published decisions; and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in the annual volumes are available in advance of their consolidation into the annual volume through the circulation of individual decision copies and through the issuance of monthly pamphlets. The last pamphlet for each quarterly period includes quarterly index digests and citation tables. In addition, the last pamphlet for the annual period includes a complete cumulative index digest with citation tables for all of the decisions to appear in the annual volume.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894—1929," the second and subsequent indexes being entitled "Index Digest of the Published Decisions of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the Federal Government.

Decisions appearing in the published annual volumes should be cited by volume, page number and year issued, *e.g.,* 62 Comp. Gen. 701 (1983). Decisions of the Comptroller General which do not appear in the published volumes should be cited by the appropriate file number and date, *e.g.,* B-213077, September 30, 1983.

Procurement law decisions issued since January 1, 1974, whether or not included in these volumes, are also available in published form from commercial sources.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

COMPTROLLERS GENERAL OF THE UNITED STATES

1921 To Date

Name	State	Date of appointment	Expiration of service
Charles A. Bowsher	Indiana	Oct. 8, 1981	
Elmer B. Staats	Kansas	Mar. 4, 1966	[1] Mar. 3, 1981
Joseph Campbell	New York	Mar. 18, 1955	[1] July 31, 1965
Lindsay C. Warren	North Carolina	Aug. 1, 1940	[1] Apr. 30, 1954
Fred H. Brown	New Hampshire	Apr. 7, 1939	[2] June 19, 1940
J. Raymond McCarl	Nebraska	June 29, 1921	June 30, 1936

COMPTROLLERS OF THE TREASURY

1894–1921

Walter W. Warwick	Ohio	Sept. 1, 1915	June 30, 1921
George E. Downey	Indiana	May 16, 1913	Aug. 31, 1915
Robert J. Tracewell	Indiana	July 26, 1897	May 15, 1913
Robert B. Bowler	Ohio	Oct. 1, 1894	Aug. 4, 1897

1817–1894

First Comptrollers

Robert B. Bowler	Ohio	May 6, 1893	Sept. 30, 1894
Asa C. Matthews	Illinois	May 10, 1889	May 14, 1893
Milton J. Durham	Kentucky	Mar. 20, 1885	Apr. 22, 1889
William Lawrence	Ohio	July 15, 1880	Mar. 24, 1885
Albert G. Porter	Indiana	Mar. 5, 1878	June 10, 1880
Robert W. Taylor	Ohio	Jan. 14, 1863	[3] Feb. 25, 1878
Elisha Whittlesey	Ohio	Apr. 10, 1861	[3] Jan. 7, 1863
William Medill	Ohio	Mar. 26, 1857	Apr. 30, 1861
Elisha Whittlesey	Ohio	May 31, 1849	Apr. 30, 1857
James W. McCulloh	Maryland	Apr. 1, 1842	May 31, 1849
Walter Forward	Pennsylvania	Apr. 6, 1841	Sept. 13, 1841
James N. Barker	Pennsylvania	Feb. 23, 1838	Apr. 19, 1841
George Wolf	Pennsylvania	June 18, 1836	Feb. 28, 1838
Joseph Anderson	Tennessee	Mar. 3, 1817	June 30, 1836

[1] Retired.
[2] Resigned.
[3] Died in office.

1817–1894

Second Comptrollers

Name	State	Date of appointment	Expiration of service
Charles H. Mansur	Missouri	May 27, 1893	Sept. 30, 1894
Benj. F. Gilkeson	Pennsylvania	May 23, 1889	June 5, 1893
Sigourney Butler	Massachusetts	Apr. 22, 1887	May 26, 1889
Isaac H. Maynard	New York	June 2, 1885	Apr. 1, 1887
William W. Upton	Oregon	Oct. 1, 1877	June 1, 1885
Cyrus C. Carpenter	Iowa	Jan. 7, 1876	Sept. 30, 1877
John M. Brodhead	New Hampshire	May 29, 1863	Jan. 23, 1876
James M. Cutts	District of Columbia	Oct. 1, 1857	May 11, 1863
John M. Brodhead	New Hampshire	Feb. 11, 1853	Oct. 8, 1857
Edward J. Phelps	Vermont	Oct. 1, 1851	Feb. 13, 1853
Hiland Hall	Vermont	Nov. 27, 1850	Sept. 10, 1851
Albion K. Parris	Maine	June 18, 1836	Nov. 28, 1850
James B. Thornton	New Hampshire	May 27, 1830	June 30, 1836
Isaac Hill	New Hampshire	Mar. 21, 1829	May 24, 1830
Richard Cutts	Massachusetts	Mar. 6, 1817	Mar. 21, 1829

1789–1817

Comptrollers of the Treasury

Joseph Anderson	Tennessee	Feb. 28, 1815	Mar. 3, 1817
Ezekiel Bacon	Massachusetts	Feb. 11, 1814	Feb. 28, 1815
Richard Rush	Pennsylvania	Nov. 22, 1811	Feb. 10, 1814
Gabriel Duvall	Maryland	Dec. 15, 1802	Nov. 21, 1811
John Steele	North Carolina	July 1, 1796	Dec. 14, 1802
John Davis	Massachusetts	June 26, 1795	June 30, 1796
Jonathan Jackson	Massachusetts	Feb. 25, 1795	Sept. 1, 1795
Oliver Wolcott, Jr	Connecticut	June 17, 1791	Feb. 2, 1795
Nicholas Eveleigh	South Carolina	Sept. 11, 1789	Apr. 16, 1791

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

1971—1980

Name	State	Date of appointment	Expiration of service
Rober F. Keller	Maryland	[1] July 13, 1971	[3] Feb. 29, 1980

SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL OF THE UNITED STATES

1981 To Date

Milton J. Socolar	Maryland	Oct. 8, 1981	

ASSISTANT COMPTROLLERS GENERAL OF THE UNITED STATES

1921-1971

Robert F. Keller	Maryland	Sept. 29, 1969	July 12, 1971
Frank H. Weitzel	District of Columbia	Jan. 18, 1954	[3] Jan. 17, 1969
Frank L. Yates	West Virginia	May 1, 1943	[2] June 29, 1953
Richard N. Elliott	Indiana	Mar. 6, 1931	[3] Apr. 30, 1943
Lurtin R. Ginn	Indiana	June 30, 1921	[3] Nov. 11, 1930

ASSISTANT COMPTROLLERS OF THE TREASURY

1894-1921

Charles Marshall Foree	Kentucky	Sept. 1, 1915	June 30, 1921
Walter W. Warwick	Ohio	May 24, 1913	Aug. 31, 1915
Leander P. Mitchell	Indiana	Jan. 18, 1898	[3] Dec. 6, 1912
Edward A. Bowers	Connecticut	June 6, 1895	Dec. 24, 1897
Charles H. Mansur	Missouri	Oct. 1, 1894	Apr. 16, 1895

[1] Title changed to Deputy Comptroller General of the United States.
[2] Died in office.
[3] Retired.

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[B-208406]

Merit Systems Protection Board—Employees—Administrative Leave—Retroactive Application—Administrative Authority—Brief, Partial Office Shutdown

The Merit Systems Protection Board asks whether administrative leave may be granted retroactively to employees who were ordered not to report for work during a brief partial shutdown of the agency. The employees were placed on half-time, half-pay status in order to forestall a funding gap which would have necessitated a full closedown. In its discretion, the Board has the authority to retroactively grant administrative leave with pay to the affected employees to the extent appropriated funds were available and adequate on the dates of the partial shutdown.

Matter of: Merit Systems Protection Board—Administrative Leave—Partial Shutdown, October 6, 1982:

Mr. Richard Redenius, the Managing Director, Merit Systems Protection Board (MSPB or Board), has requested a decision as to the authority of MSPB to grant retroactive administrative leave to its employees who were ordered not to report for work during an administratively declared partial shutdown resulting from the Board's efforts to forestall a funding gap. For the reasons stated herein, we hold that the Board may grant retroactive administrative leave to its employees for the time in question.

BACKGROUND

On December 15, 1981, the Congress passed a continuing resolution which had the effect of cutting the MSPB's fiscal year 1982 appropriation by 16 percent. This unforeseen budgetary shortfall and the Board's uncertainty as to when or whether needed supplemental appropriations would be passed resulted in a management decision in the summer of 1982 to stretch fiscal year 1982 appropriations as far as possible by initiating a partial shutdown. The Board viewed the partial shutdown as an alternative to the potential of a full closedown in early August 1982 for the balance of fiscal year 1982. In order to forestall such a full closedown, the Board initiated a partial shutdown on July 6, 1982. All employees, with the exception of a small number of essential employees, were placed on half-time, half-pay status for the period from July 6, 1982, through July 14, 1982, with actual time missed ranging from a mimimum of 2 days to a maximum of 5 days. On July 18, 1982, the President signed into law the Urgent Supplemental Appropriations Act of 1982, Pub. L. 97-216, 96 Stat. 180, which in Title I, Chapter 4, added $4,006,000 to the MSPB's appropriations for salaries and expenses, an amount sufficient to fund the Board through fiscal year 1982 at full staff. Since the Congress had passed the bill the previous Thursday, July 15, 1982, and since the Board did not anticipate a veto, the Board called all staff back to full-time work on that date.

The question presented is whether, in view of changed circumstances stemming from enactment of the Urgent Supplemental Appropriations Act, the Board may now utilize funds which it reports were on hand at the time of the partial shutdown to grant retroactive administrative leave with pay to those employees who were ordered not to report to work during the partial shutdown.

OPINION

Neither the Office of Personnel Management nor its predecessor, the Civil Service Commission, has issued any general regulations on the subject of granting excused absences to employees without loss of pay or charge to leave (commonly called "administrative leave"). Further, there is no general statutory authority under which Federal employees may be excused from their official duties without loss of pay or charge to leave. However, excused absences with pay have been authorized in specific situations. For example, section 6326 of Title 5, United States Code, authorizes an absence of up to 3 days for an employee to participate in funeral services of an immediate relative who died as a result of military service in a combat zone.

In addition, over the years, it has been recognized that, in the absence of a statute controlling the matter, the head of an agency may in certain situations excuse an employee for brief periods of time without charge to leave or loss of pay. Some of the more common situations in which agencies generally excuse absence without charge to leave are discussed in Federal Personnel Manual (FPM) Supplement 990-2, Book 630, Subchapter S11. See 53 Comp. Gen. 582 (1974).

Additionally, the Federal Personnel Manual states that "[t]he closing of an activity for brief periods is within the administrative authority of an agency." FPM Chapter 610, S3-1(a). Examples of the appropriate use of such authority given by the FPM include (1) when normal operations are interrupted by events beyond the control of management or employees such as emergency conditions; and (2) when managerial reasons require the closing of an establishment or portions thereof for short periods of time.

We recognize, of course, that the MSPB case is not the normal situation. The Board's employees were placed on a partial nonpay status as the result of a considered management decision and not as the result of an uncontrollable interruption of normal operations or a breakdown of machinery or power failure. Nevertheless, we believe the partial closing of the Board's offices in the circumstances described above falls within the scope of the administrative authority of an agency to close an activity or part thereof for brief periods when required for managerial reasons, as described in FPM Chapter 610, S3-1, and in FPM Supplement 990-2, Book 610, S3-1.

We recognize also that this case involves the retroactive granting of administrative leave to a group of employees instead of the usual issue of a prospective grant of administrative leave. Here again, we have permitted retroactive administrative leave in proper cases. See 53 Comp. Gen. 582 (1974). In our view, the key issue here is whether the agency has the discretionary authority to allow administrative leave, not whether it is retrospective or prospective.

In the present situation, we believe that the Board, in its discretion, has the authority to grant excused absences to its employees. The purpose of the MSPB partial shutdown was to permit the agency's continued functioning at some level for an uncertain length of time. Thus, the MSPB, to stretch out funds, which it reports still remained under the previously enacted continuing resolution, made a management decision to place employees on half-time status. Administrative leave with pay, whether retroactive or prospective, when an agency is without funds would be in violation of the Anti-Deficiency Act, 31 U.S.C. § 665 (1976). Here, however, the MSPB reports that funds were not lacking; rather the problem was uncertainty as to whether promised additional funds for future operation would be made available.

The enactment of the supplemental appropriations bill has, however, made it unnecessary for the MSPB to retain these previously appropriated funds for later use and has made the funds available to pay the employees for the period of the partial closing. The legislative history of the supplemental appropriations legislation includes statements by Representative Conte, the ranking minority member of the House Committee on Appropriations, during the debate, noting that the supplemental appropriations would permit use of the remaining funds under the continuing resolution to compensate employees for the nonworkdays resulting from the emergency situation. He stated:

> It would be unfair to penalize the employees because of the failure of Congress to pass the necessary legislation to allow the Board to operate at full scale * * *. [I]n my opinion, once the supplemental is passed and available to the Board, the furlough should be treated as a situation justifying administrative leave or excused absence so that employees can be justly paid. 128 CONG. REC. H4027 (daily edition, July 13, 1982) (remark of Representative Conte).

Accordingly, we find that the Merit Systems Protection Board may, in its discretion, grant administrative leave retroactively to the employees affected by the partial shutdown, as a proper exercise of its administrative discretion to the extent to which funds had been appropriated and were available and adequate on the date in question to cover the amount of the gross salaries of the affected employees.

[B-203100]

Courts—Judgments, Decrees, etc.—Interest—Delayed Payment of Judgment—Not Due to Unsuccessful Government Appeal—Court of Claims Judgment

Interest is allowable on Court of Claims judgment under 28 U.S.C. 2516(b) only in cases of unsuccessful appeal by the Government. Delay resulting from consideration of whether to seek further review, or from filing of post-judgment motions, does not create entitlement to interest. Therefore, Plaintiffs are not entitled to interest on Court of Claims judgment where Department of Justice did not certify judgment to General Accounting Office for payment until after Court had denied Government's motion to vacate. 59 Comp. Gen. 259 and 58 *id.* 67 are explained.

Matter of: *Alyeska Pipeline Service Company* v. *United States*—Interest on judgment, October 12, 1982:

The plaintiffs in *Alyeska Pipeline Service Co.* v. *United States,* Ct. Cl. No. 384-78, claim that they are entitled to post-judgment interest. We hold that they are not for the reasons stated below.

Facts

Alyeska was an action filed by a group of pipeline companies against the United States in the Court of Claims. (The merits of the case are not relevant to this discussion.) The Court rendered a judgment on the issue of liability only on June 18, 1980, holding that the plaintiffs were entitled to recover on their first claim. The Government moved for reconsideration of the judgment, which the Court denied on October 3. On October 31, the Court entered a judgment of $12,253,730 based on the trial judge's recommendation and the stipulation of the parties. The plaintiffs filed a certified copy of the judgment with the General Accounting Office on November 13.

On January 19, 1981, the Government filed a motion to vacate the judgment with the Court of Claims. On March 4, 1981, the United States moved to withdraw its motion. The Court denied the motion to vacate on March 6.

During much of the time the Government's motion to vacate the judgment was pending in the Court of Claims, the Solicitor General was in the process of making his determination of whether to petition the Supreme Court for certiorari. The Government's deadline ordinarily would have been January 2, 1981, based upon the lower court's denial of the motion for reconsideration on October 3, 1980. However, on December 19, 1980, the Government requested, and was granted, a 60-day extension. Accordingly, the time for filing the Government's petition expired on March 2, 1981.

The Department of Justice informed GAO on February 27, 1981, that the Solicitor General had decided not to petition for certiorari. The Department also instructed GAO not to certify payment of the judgment, however, until the Court of Claims had disposed of the motion to vacate which was still before it. On March 12, the De-

partment notified GAO that the Court of Claims had denied its motion, that the Department did not intend to seek further review, and that it did not object to payment of the judgment. Our Claims group issued a Certificate of Settlement for payment of the judgment on March 16.

Discussion and Conclusion

The statutory provisions governing interest on judgments of the Court of Claims are 28 U.S.C. § 2516 and the second proviso of 31 U.S.C. § 724a. 28 U.S.C. § 2516(a) provides, in essence, that the Government may pay interest on Court of Claims judgments only as provided by contract or statute. Subsection 2516(b) provides:

> (b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid at the rate of four percent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed. * * *

The second proviso of 31 U.S.C. § 724a later substituted the GAO for the Treasury Department as the agency with which the transcript must be filed. Accordingly, the statutes when read literally provide that the United States is liable for interest on Court of Claims judgments only when the Government appeals and loses, and then only from the date a copy of the judgment is filed with GAO to the date of the mandate of affirmance.

The plaintiffs contend that they are entitled to 4 percent interest from the date of the filing of the transcript until March 12, 1981—the date on which the Department of Justice notified GAO that the motion to vacate the judgment before the Court of Claims had been denied, and that the Department had no objection to payment. In support of their contention, the plaintiffs rely on two Comptroller General decisions in which we allowed interest even though the "mandate of affirmance" requirement had not been met literally—*Vaillancourt* v. *United States,* 58 Comp. Gen. 67 (1978) and *Edmonds* v. *United States,* 59 Comp. Gen. 259 (1980). (Both decisions actually involved district court judgments. However, as discussed in *Vaillancourt,* the district court provisions were patterned after the Court of Claims interest provisions and are essentially similar, except that interest in district court cases is triggered by the filing of an intermediate appeal rather than petition for certiorari to the Supreme Court.)

In *Vaillancourt,* the Government filed a notice of appeal and, after a delay of over a year, agreed to a stipulation to dismiss the appeal. We construed the requirement for a mandate of affirmance in light of the purpose of the interest provision which was to compensate a plaintiff for the delay in receiving payment of his judgment due to the Government's unsuccessful appeal. We held that it was consistent with this purpose to allow interest when the Government appeals and simply does not prosecute the appeal.

In *Edmonds,* the United States appealed the denial of its motion to reopen a district court judgment so that taxes could be withheld from the judgment proceeds. The Government filed a notice of appeal and then agreed to a stipulation dismissing the appeal 3 weeks later. Following *Vaillancourt,* we allowed interest even though there was no mandate of affirmance because the Government's appeal had delayed the plaintiff's receiving payment.

In *Edmonds,* in the course of our discussion of our reasoning in *Vaillancourt,* we said that "the basic purpose of the [interest] statute, as supported by the legislative history, is to compensate a successful plaintiff for the delay in receiving his money judgment attributable solely to Government action or inaction." Citing this statement, the plaintiffs interpret the two cases as standing for the proposition that claimants are entitled to interest whenever there is *any* delay in receiving judgment proceeds attributable to the Government—not just when there is a delay because of an appeal. The plaintiffs cite the United States' motion for reconsideration, its request for extension of time, and its motion to vacate the judgment as actions attributable solely to the Government causing delay in payment.

Before preparing this decision, we solicited the views of the Justice Department. For essentially the same reasons discussed below, Justice concluded that there was no entitlement to interest. We agree.

Vaillancourt and *Edmonds* do not support the plaintiff's contention. An appeal is the only Governmental action causing a delay in receiving payment which entitles a plaintiff to post-judgment interest under 28 U.S.C. § 2516(b). In both *Vaillancourt* and *Edmonds* the Government appealed, and then consented to dismiss its appeal. The issue in the two cases was whether, in view of the "mandate of affirmance" requirement of the first proviso of 31 U.S.C. § 724a, the plaintiffs were entitled to post-judgment interest even though the appellate court had not conducted a review on the merits. We concluded that the filing of a notice of appeal and the subsequent stipulation to dismiss the appeal satisfied the statutory condition since, as discussed above, the essence of the provision is delay in receiving payment occasioned by an unsuccessful Government appeal. Our statement in the *Edmonds* case concerning delay should be read in the context of the facts of the case—delay occasioned by *appeal* by the Government. *Vaillancourt* and *Edmonds* stand for the proposition that a review of a case on its merits is not necessary to the payment of interest under 31 U.S.C. § 724a as long as the delay encountered by the plaintiff in receiving his money is caused by the United States' appeal of the case, and the ultimate resolution is the same as if there had been a mandate of affirmance—*i.e.,* where the appeal is dismissed by stipulation.

Moreover, the legislative history of 31 U.S.C. § 724a suggests that Congress did not intend that the appropriation it established be

available to pay post-judgments interest in every case in which a plaintiff suffers a delay in receiving payment of his judgment which may be attributable to the Government.

Rather, the history shows that Congress intended to provide interest only in cases in which the delay resulted from an appeal. When Congress established the permanent indefinite appropriation for the payment of judgments in 1956, it also changed the rule with respect to interest on district court judgments to make it the same as the rule for interest on judgments of the Court of Claims. In so doing, Congress showed that it did not want interest paid in cases such as this one. Prior to the change, interest was paid on most district court judgments, whether or not the case was appealed, from the date of the original judgment. See 28 U.S.C. § 2411(b). Under the old rule, any delay in the payment of the plaintiff's judgment such as those experienced in this case could cause additional interest to accrue. However, in view of the fact that Congress specifically eliminated the old district court rule when it was enacting the judgment appropriation, we see no basis to broaden our interpretation of the Court of Claims post-judgment interest provisions to include cases not appealed.

Congress was aware that eliminating post-judgment interest in cases not appealed would save the Government money. In fact, this was the very reason for the provision. The Bureau of the Budget (now Office of Management and Budget) had worked with GAO and the Justice Department in drafting the provision that became 31 U.S.C. § 724a. The Bureau prepared a report which explained the interest provisions and their purpose. The report was inserted into the record of the hearings on the 1957 Supplemental Appropriations Bill. The report stated:

Interest on judgments

The present situation with respect to the payment of interest is undesirable in two respects—first, the Government, because of the delay in making appropriations, bears the expense of interest which could be saved if appropriations were available for payment of the judgments when rendered; and second, there is a wide variance between the provisions of law respecting the payment of interest on judgments rendered by the district courts as compared with those rendered by the Court of Claims. Interest is paid on Court of Claims judgments only when the United States appeals and then only from the date when the transcript of the judgment is filed with the Treasury Department to the date of the mandate of affirmance. Interest is paid on judgments of the district courts, regardless of whether the Government appeals, from the date of the judgment to a date not later than 30 days after the making of an appropriation for payment of the judgment.

It is believed that the provision for payment for interest in cases where the Government appeals, as now prescribed by law with respect to judgments in the Court of Claims, is fair and equitable and need not be disturbed. If this belief is correct, it would follow that interest should be paid on judgments of the district courts on the same basis. If interest on judgments of the district courts were placed on the same basis as the Court of Claims, *interest on* district courts *judgments not appealed by the United States would be eliminated entirely.* In district court cases which are appealed by the Government, interest would be eliminated from the date the judgment was rendered to the date the plaintiff filed a transcript thereof with the proper Government agency, and from the date of the mandate of affirmance to the time when a specific appropriation could be secured for the payment of the judgment. This latter period averages about 6 months.

A specific study by the General Accounting Office in 1953 indicated that the interest savings in the 82d Congress would have been approximately $70,000 if the basis for payment of district court judgments were conformed to the Court of Claims practice and if appropriations were available for immediate payment of judgments when they become final. Since there is no indication that judgments are likely to decrease in number or amount, it appears that substantial amounts of interest could be saved in each Congress under such a procedure. Hearings on Supplemental Appropriation Bill, 1957, Before Sub-committees of the House Committee on Appropriations, 84th Cong., 2d Session, pt. 2, at 883-84 (1956). [Italic supplied.]

This statement makes it clear that providing interest in cases where the Government has not appealed but there has been delay was specifically considered and rejected.

Even if there were no relevant legislative history, the explicit language of the governing statute presents a barrier to the plaintiffs' claim which we find insurmountable. Quoted earlier in this decision, 28 U.S.C. § 2516(b) authorizes interest only on those Court of Claims judgments that are "affirmed by the Supreme Court after review on petition of the United States." This language leaves little if any room for interpretation. The term "petition" in this context can mean only a petition for certiorari, since this is the only vehicle by which the judgment may be "affirmed by the Supreme Court." A motion to vacate filed with the Court of Claims simply does not suffice. To hold otherwise would be to ignore the plain words of the statute.

In sum, absent explicit statutory or contractual authority, delay in payment, even where the delay is attributable solely to the Government, does not create an entitlement to interest. See, e.g., *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947); *Grey* v. *Dukedom Bank*, 216 F.2d 108, 110 (6th Cir. 1954); *United States* v. *James*, 301 F. Supp. 107, 132 (W.D. Tex. 1969); B-182346, February 4, 1975.

Delay in paying a judgment may be caused by a number of things: the Government's consideration of whether to seek further review, including any permissible extensions of time; the filing of various post-judgment motions with the trial court; or simple administrative delay. Our *Vaillancourt* and *Edmonds* decisions allowed interest only in the one situation recognized by the governing statutes—delay occasioned by a Government appeal. They were not intended to suggest that interest is allowable in any other situation, nor should they be so construed.

We note in this connection that Congress has recently amended the statutes governing post-judgment interest against the United States, Pub. L. No. 97-164, § 302, 96 Stat. 25, 55 (enacted April 2, 1982, effective October 1, 1982), 28 U.S.C. 1631. The thrust of the new law is to increase the rate of interest, where allowable, to a more equitable level. (The 4 percent rate specified in 28 U.S.C. § 2516(b) had been unchanged since 1890.) However, the new law expressly retains the essential prerequisite of an unsuccessful appeal by the Government. That this was clearly the intent of the

new law is confirmed by its legislative history. See Cong. Rec., December 8, 1981 (daily ed.), pp. S-14699-700, especially the two letters to Senator Dole from the Director, Office of Management and Budget.

Accordingly, since the Government did not file a petition for certiorari in this case, we conclude that there is no basis to allow the plaintiffs' claim for post-judgment interest.

[B-200923]

Appropriations—Continuing Resolutions—Availability of Funds—Unliquidated Obligations—Funding in Later Regular Appropriations—Absence/Insufficiency

Funds appropriated for appropriation accounts of the Departments of Agriculture and Transportation by fiscal year 1982 continuing resolutions, and properly obligated during the period the resolutions were in effect, remain available to liquidate the obligations incurred even though later regular appropriation acts provided no funding at all for these programs. Treasury is required to restore the applicable accounts established pursuant to the continuing resolutions at amounts sufficient to cover the unliquidated obligations. B-152554, Feb. 17, 1972, is overruled in part.

Matter of: Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, October 19, 1982:

In January of 1982, we were informally advised that the Department of the Treasury had withdrawn undisbursed balances, including sums previously obligated, from appropriation accounts established under authority of the fiscal year 1982 continuing resolutions for the Department of Agriculture and the Department of Transportation, National Highway Traffic Safety Administration. In taking this action, Treasury indicated it was required to do so by language in a 1972 GAO letter applicable when an annual appropriation act does not provide sufficient funds to cover obligations incurred under a continuing resolution. As a result of the withdrawal, both agencies were unable to pay the obligations they had previously incurred under authority of the resolutions.

Since Treasury relied on a GAO opinion to justify its action, we decided to reexamine our 1972 ruling. In doing so, we solicited the views of Agriculture and Transportation, as well as the Department of the Treasury and the Office of Management and Budget. All four agencies concluded that the obligated (but not yet paid) balances remaining in the accounts at the time the agencies' annual appropriation acts were enacted should not have been withdrawn. After considering all relevant arguments, we now conclude that to the extent an annual appropriation act does not provide sufficient funding for an appropriation account to cover obligations validly incurred under the terms of a continuing resolution, the funds made available by the resolution remain available to pay these obligations.

Prior to December 23, 1981, when the regular appropriation acts for the Department of Agriculture and the Department of Transportation were enacted, programs of the Department of Agriculture and the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) were funded under the several continuing resolutions for fiscal year 1982. Under the terms of these continuing resolutions, Agriculture was provided funding for the appropriation account, Scientific Activities Overseas (Special Foreign Currency Program), at an annual level of $5,000,000 and NHTSA was provided funding for the appropriation account, Territorial Highway Safety Program, at an annual level of $975,308. Of these total sums, the Office of Management and Budget apportioned and thereby made available for obligation for the period covered by the resolutions $450,000 for Scientific Overseas Activities of Agriculture and $136,540 for the Territorial Highway Safety Program of NHTSA. Thereupon, the Department of Treasury issued and this Office countersigned appropriation warrants in these amounts for the two accounts. As of December 23, 1981, Agriculture had obligated $434,016 of its available funds. Of these obligations, $196,016 had not yet been paid. NHTSA had obligated the entire amount of its available funds, but had not yet paid any of these obligations.

On December 23, 1981, the regular annual appropriation acts for both Agriculture and NHTSA were enacted. The Agriculture appropriation act made no provision for Scientific Overseas Activities and the Transportation appropriation act made no provision for NHTSA's Territorial Highway Safety Program. Accordingly, relying on language in a 1972 GAO letter to Senator William Proxmire, B-152554, February 17, 1972, Treasury withdrew the undisbursed balances in the appropriation accounts established for the two programs under the continuing resolutions.

The 1972 letter relied on by Treasury responded to a question raised by Senator Proxmire concerning the effect of an annual appropriation act that provided funds for a particular appropriation account (previously funded by continuing resolution) at an amount lower than the amount of obligations already incurred under the resolution. While we recognized that the obligations incurred under the authority of the continuing resolution remained valid, we concluded that "any appropriations warranted under the continuing resolution in excess of the final appropriations and not disbursed would be rescinded." In our letter we assumed that the agency confronted with this situation would be able "to negotiate downward the amount of such obligations so as to come within such sums as may be finally approved by the Congress." We did not mention that if the agency could not reduce its obligations the result of our decision would be that the obligations could not be liquidated without a supplemental appropriation.

In reaching our conclusion in 1972, we relied on a provision in the resolution that expenditures under its authority should be charged to the applicable appropriation account when a regular appropriation act was enacted. We concluded that when the annual appropriation act appropriated less funds than the amount of obligations already incurred, no expenditures in excess of this appropriation amount could be charged against the applicable account. Thus, any undisbursed funds in the account in excess of the amount of the regular appropriation would have to be withdrawn. The obligations previously incurred under the authority of the continuing resolution remained valid but there were insufficient funds available in the applicable account to liquidate them.

The provision we relied on in our 1972 letter is routinely included in most continuing resolutions. In the most recent fiscal year 1982 resolution it appeared as section 104, in the following language:

> Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation fund, or authorization is contained is enacted into law. Pub. L. No. 97-92, § 104, 95 Stat. 1193 (1981).

Upon reconsideration, we are convinced that our 1972 application of this provision was wrong. The provision's history indicates that its purpose is to make it clear that the amounts appropriated by the continuing resolution are not in addition to the funds later appropriated by the regular appropriation acts. *See e.g.,* H.R. Rep. No. 91-234, 91st Cong., 1st Sess. 2 (1969). Thus, to the extent possible, obligations incurred or expenditures made under the continuing resolution are to be charged against the funds provided by the regular appropriation act.

However, this does not mean that if the regular appropriation act provides insufficient funding to cover obligations made under the resolution that these obligations cannot be liquidated. Another provision generally contained in continuing resolutions covers this situation. In the most recent resolution, this provision is found in section 103. It provides as follows:

> Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution. Pub. L. No. 97-92, § 103, 95 Stat. 1193 (1981).

This section provides that funds appropriated by the continuing resolution are to remain available to liquidate obligations incurred within the availability period of the continuing resolution.

Reading these two provisions together, we reach the following results: When an annual appropriation act provides sufficient funding for an appropriation account to cover obligations previously incurred under the authority of a continuing resolution, any unpaid obligations are to be charged to and paid from the applicable account established under the annual appropriation act. Similarly, to

the extent the annual act provides sufficient funding, those obligations which were incurred and paid during the period of the continuing resolution must be charged to the account created by the annual appropriation act. On the other hand, to the extent the annual appropriation act does not provide sufficient funding for the appropriation account to cover obligations validly incurred under a continuing resolution, the obligations in excess of the amount provided by the annual act should be charged to and paid from the appropriation account established under authority of the continuing resolution.[1] Thus the funds made available by the resolution must remain available to pay these obligations.

Accordingly, Treasury should restore the applicable accounts established under authority of the continuing resolution to a level sufficient to liquidate the unliquidated obligations validly incurred by Agriculture and NHTSA.

[B-202083]

Housing and Urban Development Department—Mortgage Insurance Programs—Special Risk Insurance Fund—Availability—Judgments and Compromise Settlements

Secretary of Housing and Urban Development (HUD) provided building mortgage insurance on two projects under authority of sec. 236 of the National Housing Act, 12 U.S.C. 1715z-1. In one case, the Secretary agreed to make payments to plaintiff construction contractor in settlement of lawsuit after court had ruled that the contractor had cause of action against the Secretary on the theory of *quantum meruit.* In the second case, similar payment was directed by court judgment. The permanent indefinite appropriation established by 31 U.S.C. 724a is not available in either case. The permanent appropriation may be used to pay a judgment or compromise settlement only if no other funds are available for that purpose. The Special Risk Insurance Fund, a revolving fund created by 12 U.S.C. 1715z-3(b), is available for the payments to contractors for completion of projects for which HUD has provided mortgage insurance under sec. 236.

Matter of: *S.S. Silberblatt, Inc.* v. *East Harlem Pilot Block*—Payment of Judgment, October 28, 1982:

The issue has arisen of whether the compromise settlement in *S.S. Silberblatt, Inc.* v. *East Harlem Pilot Block, et al.,* and the judgment in *Bronson and Popoli, Inc.* v. *Enoch Star Restoration Housing Development Fund Co., Inc.,* are payable from the permanent indefinite appropriation established by 31 U.S.C. § 724a or from funds available to the Department of Housing and Urban Development (HUD). The question of the proper source of funds first arose when the *Silberblatt* settlement was submitted to this Office for certification for payment under 31 U.S.C. § 724a in September

[1] That the Congress intended this result is confirmed by committee statements with respect to the Youth Conservation Corps, another program which was funded by the fiscal year 1982 continuing resolution but not by the regular annual appropriation act. In response to an agency proposal that obligations incurred under the resolution be charged to other accounts under the regular appropriation act, the House Appropriations Committee stated:

" * * * The Committee does not approve of that procedure. The Department is expected to charge the obligations to the proper account under authority provided in the continuing resolution. H.R. Rep. No. 97-673, 97th Cong., 2d Sess. 108.

The Senate Appropriations Committee agreed. *See* S. Rep. No. 97-516, 97th Cong., 2d Sess. 114 (1982).

1980. At that time, in view of the substantial legal issues involved, we agreed to certify the settlement for payment under 31 U.S.C. § 724a and HUD agreed to reimburse the appropriation if we later decided that it was not available. Subsequently, the judgment in *Bronson,* a case very similar to *Silberblatt,* was submitted. Our agreement with HUD was extended to cover *Bronson,* and we certified that judgment for payment on the same basis.

Since certification of the *Bronson* judgment, HUD has formally submitted its views concerning the proper source of payment, which we have fully considered. For the reasons stated below, we hold that the Special Risk Insurance Fund which is available to the Secretary is the proper source of funds in cases like *Silberblatt* and *Bronson.*

Facts

Silberblatt was a suit brought by a general contractor seeking payment for work he had performed on the Taino Towers housing project in New York. HUD had provided mortgage insurance for the project under the authority of section 236(j) of the National Housing Act, 12 U.S.C. § 1715z-1(j) (1976).

Construction of the project was halted when the owner, East Harlem Pilot Block, defaulted on its mortgage loan payments. The lender collected its mortgage insurance benefits from HUD and assigned the mortgage proceeds to HUD. HUD then entered into an agreement with the mortgagors that it would become mortgagee-in-possession and would contract with a private developer (Silberblatt) for completion of the projects. Under the agreement, the mortgagor would regain possession of the projects after the developer completed construction and HUD would restructure the mortgage to cure the default.

The contractor brought suit against the owner, the lender, and against HUD as insurer, seeking payment for the work he performed on the project. The United States District Court for the Southern District of New York granted motions for summary judgment in favor of the Secretary and the project owner, and dismissed the claim against the lender. 460 F. Supp. 593 (1978). The Court of Appeals for the Second Circuit reversed the granting of summary judgments in favor of the Secretary and the owner. 608 F.2d 28 (1979). The court found that HUD had been enriched by the contractor's efforts even though it technically was not the owner of the project. The court held that the contractor was not prohibited from seeking recovery from the Secretary on a theory of *quantum meruit,* and it remanded the case to the district court.

After the Second Circuit's decision, the parties entered into a settlement agreement in which HUD agreed to pay approximately $4.16 million to satisfy the claims of the general contractor and the subcontractors for the work done in completing the project.

The relevant facts in *Bronson and Popoli, Inc.* v. *Enoch Star Restoration Housing Development Fund Co., Inc.* are very similar to those in *Silberblatt. Bronson* was a suit by contractors for expenses incurred in the construction of the Enoch Star Housing Project. The District Court for the Eastern District of New York, in a memorandum decision dated July 1, 1980 (No. 77 C 44), followed *Silberblatt* and ordered judgment entered against the Secretary in the amount of $750,000.

Discussion and Conclusion

HUD provided mortgage insurance for the Taino Towers and the Enoch Star Housing Projects in furtherance of the program established under 12 U.S.C. §1715z-1(j). That subsection authorizes a Federal mortgage insurance program for multifamily rental and cooperative housing projects for lower-income, elderly or handicapped families. Congress established the Special Risk Insurance Fund as a revolving fund to finance the program as well as other Federal housing programs.

31 U.S.C. § 724a establishes a permanent indefinite appropriation to pay judgments against the United States generally. However, 31 U.S.C. § 724a expressly provides that the permanent appropriation is only available to pay judgments "not otherwise provided for." Accordingly, the permanent appropriation may not be used if another appropriation or fund is legally available to pay the judgment in question.

It has long been our view that when Congress authorizes an agency to conduct a "business-type" program, empowers the agency to "sue and be sued" with respect to that program, and creates a revolving or other special fund to finance the program, then judgments arising from the operation of the program (as opposed to judgments which are common to all agencies such as tort or discrimination judgments) should be paid by the agency from program funds. Such judgments are viewed simply as "necessary expenses" of the program for which program funds are available. See, for example, our letter to the Administrator of the Small Business Administration, B-189443, August 4, 1980. In this sense, payment is "otherwise provided for." In fact, as will be discussed later, the *Silberblatt* and *Bronson* holdings were based explicitly on the existence of funds under HUD's control or discretion.

The Special Risk Insurance Fund created by 12 U.S.C. § 1715z-3(b) is available for judgments like *Silberblatt* and *Bronson;* therefore, the permanent appropriation may not be used.

We have twice found that HUD Insurance Fund money may be used to pay project construction costs. In 54 Comp. Gen. 1061 (1975), we held that HUD's insurance funds—the Special Risk Insurance Fund or the General Insurance Fund (12 U.S.C. § 1735e), depending on the section under which the particular project was

insured—were available for the purpose of making repairs to multifamily projects after the HUD-insured mortgages had gone into default and subsequently been assigned to the Secretary. We issued the decision at the request of HUD's Office of General Counsel which urged that we allow such expenditures. We based our conclusion upon the last sentence of 12 U.S.C. § 1713(k) which governs the Secretary's rights as assignee of an insured mortgage. It provides:

> Pending such acquisition by voluntary conveyance or by foreclosure, the Secretary is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve and protect the lien of such mortgage.

We held that the provision did not require that the Secretary be contemplating foreclosure when he makes repair expenditures from the Fund. We concluded that the Secretary could make the expenditures until the default was cured or until HUD acquired title, provided that one event or the other occurred within a reasonable time after the expiration of 1 year from the default.

In August 1979, during the course of our audit work, we had occasion to consider informally whether our decision at 54 Comp. Gen. 1061 and the provisions of the National Housing Act allowed the Secretary to expend insurance funds to complete (in addition to repair) a project after the mortgagors defaulted and the mortgage was assigned. We found that several subsections of 12 U.S.C. § 1713 authorized such expenditures.

We noted that 12 U.S.C. § 1713(g) recognizes that the fund is available to pay project completion costs. The subsection governs the payment of insurance benefits to the original mortgagee after a default. It states that in addition to the amount of mortgage money expended, the mortgagee is entitled to reimbursement from the fund for taxes, property insurance and for reasonable expenses for the completion of the property. A memorandum from our General Counsel to our Community and Economic Development Division (B-171630-O.M., August 22, 1979), concluded:

> Thus, this provision recognizes that the rights of a mortgagee include the right to construct, improve, or repair the mortgaged premises. Significantly, these expenses are expressly reimbursable from the General Insurance Fund. Consequently, the Secretary's rights as mortgagee under section 1713(k) should also include these rights and the necessary expenditures should be chargeable to the General Insurance Fund.

The availability of the insurance funds for the types of payments involved in *Silberblatt* and *Bronson* is a logical application of our previous conclusions.

HUD argues that the legislative history of Pub. L. No. 87-187, 75 Stat. 416 (1961) indicates that the appropriation made by 31 U.S.C. § 724a was intended to be the source of payment in cases such as *Silberblatt* and *Bronson.* Public Law 87-187 amended section 724a

by adding the compromise settlements, in addition to final judgments, could be paid from the judgment fund. HUD refers to a letter from the Department of Justice which recommended the amendment (reprinted in [1961] U.S. CODE CONG. & AD. NEWS, pg. 2439). HUD interprets the Department's letter as stating that the purpose of the amendment was to prevent delay in the payment of compromise settlements which is caused by the agency concerned having to interpret its authorizing and appropriations legislation to determine if it has funds available. HUD points out that there would have been such a delay in *Silberblatt* if we had not agreed to proceed with payment and then settle the question as to the proper source of funds. HUD's view is, in effect, that agency funds are not available for compromise settlements if "time-consuming" legislative interpretation is required.

We disagree. An examination of the origin of the judgment fund indicates otherwise. Prior to the enactment of the statute which created the judgment fund, a person who had a judgment against the United States could be paid only if Congress appropriated funds specifically for the payment of his judgment. Congress viewed this method of paying judgments as unsatisfactory because it resulted in persons who had a right to Government funds having to wait an unduly long time to receive their money and because it resulted in unnecessary administrative expense and interest costs due to the delay. (Hearings on Supplemental Appropriations Bill, 1957, Before Subcommittees of the House Committee on Appropriations, 84th Cong., 2 Sess., pt. 2 at 883 (1956).)

Accordingly, Congress established a permanent indefinite appropriation which allowed for the immediate payment of judgments. However, in so doing, Congress provided that where another appropriation or fund was available to pay the judgment, the appropriation would not be used. The reason for this is that it would not be necessary to provide for the immediate payment of a judgment for which funds were already available.

The phrase "not otherwise provided for" should be interpreted in light of the congressional purpose for creating the judgment fund. The fact that it might be necessary to do some statutory interpretation to determine if a particular appropriation is available to pay a judgment or compromise settlement does not preclude use of that appropriation. We have, on a number of occasions, interpreted statutory schemes to find that the payment of a judgment was "otherwise provided for." 56 Comp. Gen. 615 (1977); 52 *id.* 175 (1972); B-129072, October 22, 1974.

In addition, the 1961 amendment which added "compromise settlements" to 31 U.S.C. § 724a (Pub. L. No. 87-187, *supra*) was intended to serve a very narrow purpose. When 31 U.S.C. § 724a was first enacted in 1956, it applied only to judgments and not to compromise settlements. Thus, as to situations not otherwise provided for, judgments could be paid promptly while compromise settle-

ments continued to require specific congressional appropriations. To avoid what many viewed as an incongruity, it became common in the late 1950's to reduce compromise settlements to consent judgments, for the sole purpose of taking advantage of the prompt payment mechanism of section 724a. The 1961 amendment cured this situation by making the judgment appropriation available for compromise settlements to the same extent that it was already available for judgments in similar cases. (It also added certain judgments and compromise settlements of State and foreign courts, not relevant here.) The "delay" referred to throughout the legislative history of 31 U.S.C. § 724a and subsequent amendments means delay in obtaining specific appropriations, not delay in analyzing and construing statutes to determine the proper source of funds.

HUD also contends that the Special Risk Insurance Fund is merely "similar to an insurance reserve maintained at a sufficient level to satisfy claims against insurance policies as they mature at an actuarially predictable rate." HUD argues that the legislative history of 12 U.S.C. § 1715z-3(b) which establishes the Fund does not indicate that Congress contemplated using it for broader purposes such as the payments in the *Silberblatt* and *Bronson* cases.

Our examination of the legislative history indicates otherwise. Congress passed section 1715z-3 creating the Special Risk Insurance Fund as part of the Housing and Urban Development Act of 1968, which added a new section 238 to the National Housing Act. (Pub. L. No. 90-448, section 104(a), 82 Stat. 487, Aug. 1, 1968.) The Banking and Currency Committee of the House of Representatives, in its report on the bill later enacted as Public Law 90-448, explained the section creating the fund as follows:

SPECIAL RISK INSURANCE FUND

Section 104 of the bill would establish, through a new section 238 of the National Housing Act, a "Special Risk Insurance Fund," which would not be intended to be actuarially sound and out of which claims would be paid on mortgages insured under the new sections 235—homeownership assistance (proposed by sec. 101 of the bill); 236—assistance for rental and cooperative housing (proposed by sec. 201 of the bill); 237—credit assistance (proposed by sec. 102 of the bill); as well as those mortgages insured pursuant to the authority contained in the amendments to section 223—properties in older, declining urban areas (proposed by sec. 103 of the bill) and section 233—development of new technologies for lower income housing (proposed by sec. 108 of the bill).

The fund would be established with a $5 million advance from the general insurance fund, which would be repayable at such time and at such interest rates as the Secretary of HUD deemed appropriate. Since these programs cannot be expected to be operated on an actuarially sound basis if the insurance premium charge is to be set at a reasonable level, appropriations to the fund would be authorized to cover any losses sustained by the fund in carrying out the mortgage insurance obligations of these programs. The term, losses, as used in this provision, is the same as presently appears in a similar authority under section 221(f) of the National Housing Act. In both instances, it is intended that the Secretary be able to obtain appropriations to cover anticipated or projected losses as well as actual losses, in order to provide adequate operating funds during the long period required to liquidate properties.

Insurance benefits would generally be similar to those authorized for mortgages insured under section 221 of the National Housing Act. Payments on claims would

be made either in cash or debentures and could be in an amount equal to the unpaid principal balance of the loan plus any accrued interest and any advances made by the mortgagee with approval of the Secretary and under the provisions of the mortgage, where permitted in the regulations prescribed by the Secretary. Income such as insurance premiums and service charges in connection with the covered programs would be deposited in the new fund. *Administrative expenses in connection with these programs and expenses incurred with respect to defaults would be charged to the fund.* H.R. Rep. No. 1585, 90th Cong., reprinted in U.S. CODE CONG. AD. NEWS, 2873, 2885). [Italic supplied.]

In view of the above-quoted language and legislative history, while HUD's contention that the fund is "similar to an insurance reserve maintained at a sufficient level to satisfy claims against insurance policies as they mature at an actuarially predictable rate" may be true for the most part, it does not exclusively define the limits of the fund's availability.

Finally, HUD contends that the fact that Congress saw fit to waive sovereign immunity for HUD by authorizing the Secretary to sue and be sued in connection with the section 236 program does not, in and of itself, mean that any judgments against the Secretary are not to be satisfied from the judgment fund. HUD notes that "allowing suits against an agency is an entirely different matter from appropriating the money to pay judgments and settlements of such suits."

This is an issue the *Silberblatt* and *Bronson* courts addressed. Following the Supreme Court's guidance in *F.H.A.* v. *Burr,* 309 U.S. 242 (1940), the *Silberblatt* court stated:

> For a claim to be against the Secretary, and therefore within the scope of the "sue and be sued" clause, as opposed to a suit against the United States, any judgment for plaintiff must be out of funds in the control of the Secretary as distinguished from general Treasury funds. [Citation omitted.] This requirement is satisfied if the judgment could be paid out of funds appropriated under the National Housing Act and in the control or subject to the discretion of the Secretary. * * * 608 F.2d at 36.

The *Bronson* court followed *Silberblatt,* holding as follows:

> The *Silberblatt* court also held that a judgment against the Secretary could be paid out of "funds appropriated under the National Housing Act and in the control or subject to the discretion of the Secretary." * * * Because there are funds in the control of the Secretary which are available to pay the judgment in the present case, the Court need not consider whether it has the power to enter a judgment in the absence of such funds. E.D.N.Y., No. 77 C 44, mem. op. at 5-6 (July 1, 1980).

We are aware that the Ninth Circuit has taken a different view. *Marcus Garvey Square, Inc.* v. *Winston Burnett Construction Co.,* 595 F.2d 1126 (9th Cir. 1979). However, the weight of judicial authority seems to be in accord with *Silberblatt. Industrial Indemnity, Inc.* v. *Landrieu,* 615 F.2d 644 (5th Cir. 1980); *Trans-Bay Engineers, & Builders, Inc.* v. *Hills,* 551 F.2d 370 (D.C. Cir. 1976). We agree with the "majority view" as expressed in *Silberblatt.*

In accordance with the foregoing, we conclude that judgments and compromise settlements in cases arising from HUD's various mortgage insurance programs, including situations like *Silberblatt* and *Bronson,* are payable from the insurance funds applicable to those programs, and not from the permanent judgment appropriation.

[B-206704]

Transportation—Household Effects—Weight Limitation—Excess Cost Liability—Constructive Weight Substitution—Weight Certificate Invalid

Transferred employee was assessed weight charges for 4,300 pounds over statutory maximum household goods shipment of 11,000 pounds. Mover admitted that weight certificates were invalid because 200 pounds unrelated to employee's move were included in weight due to unintended error and for which mover made refund to Government. The invalidation of the weight certificates does not claim excess weight costs in the move; rather, a constructive shipment weight should be obtained under para. 2-8.2b(4) of the Federal Travel Regulations.

Transportation—Household Effects—Weight Limitation—Excess Cost Liability—Constructive Weight Basis—Computation Formula

To correct error resulting from invalidation of weight certificates, the constructive weight of the household goods shipment should be computed and substituted for the incorrect actual weight. Where the constructive weight under para. 2-8.2b(4) is unobtainable, the weight of the shipment must be determined by other reasonable means. Here, mover's evidence supporting revised constructive weight determination is unrebutted by employee, is the only evidence of record on the correct weight of the shipment, and is not unreasonable. Excess weight charges should be computed on the revised constructive weight.

Matter of: James C. Wilson—Transportation of Household Goods—Excess Weight, October 28, 1982:

Mr. James C. Wilson has been notified by the Department of Health and Human Services of his obligation to reimburse the Government for excess weight charges in connection with the shipment of his household goods upon transfer of official duty station in November 1978. The mover admitted that the weight certificates for Mr. Wilson's shipment were invalid because they included a maximum of 200 pounds which were unrelated to Mr. Wilson's shipment. Mr. Wilson believes the weight is incorrect and that he is relieved from any liability for an alleged excess in the weight of his household goods shipment.

The invalidation of the weight certificates does not mean that the agency may not claim excess weight costs in the move. Where the parties have been unable to obtain a constructive shipment weight under paragraph 2-8.2b(4) of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973), and since the only substantive evidence of record on the weight of Mr. Wilson's shipment is the revised total submitted by the carrier, we find that Mr. Wilson has failed to meet the burden of proving his claim as to the actual weight of his household goods shipment and is liable for excess weight charges.

On November 30, 1978, Mr. Wilson's household goods were moved under Government Bill of Lading No. L-0364516 from Meridian, Idaho, to Kirkland, Washington, because of his transfer of official station as an employee of the Department of Health and

Human Services. The agency reports the development of Mr. Wilson's claim as follows:

> On December 26, 1978, an invoice was received from Cartwright Van Lines for shipment of household goods for Mr. James C. Wilson pursuant to GBL #L-O-364,516 (Attachment A). This invoice included charges for 4,300 pounds of excess weight. The invoice was paid in full, and Mr. Wilson was notified of his obligation to reimburse the government the amount of $714.23 for the excess weight (Attachment B). Mr. Wilson responded by disputing the weight charged by Cartwright and submitted a statement by his wife to the effect that the truck(s) on to which their household goods were shipped contained material which did not belong to them (Attachment C). Based upon this, the matter was referred to the General Services Administration for resolution. During this time, Cartwright sent a check to us in the amount of $33.22 for 200 pounds which they admitted had been erroneously billed to the government for the subject move (Attachment D). Mr. Wilson still believed that the weight was incorrect and refused to pay.

Authority for transporting the household effects of transferred employees at Government expense is found at 5 U.S.C. § 5724(a) (1976), which also establishes the maximum weight of the goods authorized to be transported at Government expense as 11,000 pounds. The implementing regulations to that statute are found in the FTR. Paragraph 2-8.2a of the FTR repeats the 11,000 pound maximum weight allowance found in the statute. Paragraph 2-8.4e(2) provides that the employee is responsible for the payment of costs arising from the shipment of excess weight. The implementing regulations are in accord with the statutory limitation and, thus, have the force and effect of law. Therefore, regardless of the reasons for the shipment of the excessive weight of household goods, the employee is required to pay the Government the charges incurred incident to the shipment of the excess weight, *George R. Halpin,* B-198367, March 26, 1981.

We have consistently held that whether and to what extent authorized shipping weights have been exceeded in the shipment of household goods and the excess costs involved are questions of fact primarily for determination by the administrative agency which, ordinarily, we will not question in the absence of evidence showing such determinations to be clearly in error. Where the transportation voucher prepared by a mover in support of its charges is supported by a valid weight certificate or weight tickets, in the absence of fraud or clear error in the computation, the Government must rely on the scale certifications of record in computing the excess costs. *Fredric Newman,* B-195256, November 15, 1979. Thus, absent computational errors, or fraud, the Government is bound by a weight certificate unless the certificate is shown to be invalid. In order to show invalidity, one must show that the certificate is clearly in error. See *Charles Gilliland,* B-198576, June 10, 1981.

In this case, the invalidity of the net weight has been established. Mr. Wilson has charged that after the shipment was weighed, the carrier's agents were seen transferring from the truck items that were not part of the Wilson's property. Statements filed by the drivers and the agent verify that this was the case.

However, resolution of the issue of the validity of the weight certificate in Mr. Wilson's favor is itself not ultimately dispositive of whether and in what amount he is liable for excess weight charges.

Mr. Wilson argues that the agency's reliance in reimbursing the mover on such an improper weight certificate was clearly in error and he should not be bound by the agency's determination made on such a basis. Thus, he should be relieved from any liability for an alleged excess in the weight of his household goods shipment.

This argument must fail because the invalidation of the weight certificates does not mean that the agency may not claim excess weight costs in the move. In *William A. Schmidt, Jr.,* 61 Comp. Gen. 341 (1982), we held that where an error has been committed in determining the net weight of household goods shipped by the actual expense method under a Government bill of lading, a constructive shipment weight should be obtained based on 7 pounds per cubic foot as provided for by paragraph 2-8.2b(4) of the FTR. To correct the error, the constructive weight of the misweighed shipment should be computed and substituted for the incorrect actual weight. And, in *Major James S. True, USAF,* B-206951, July 12, 1982, we cited the *Schmidt* and *Gilliland* cases to show that after an invalidation of weight tickets occurs, the weight of the shipment must be determined by other reasonable means.

The constructive weight of Mr. Wilson's household goods shipment does not appear in the record and owing to the lengthy administrative consideration of this claim we must presume that such a computation under paragraph 2.8.2b(4) of the FTR is at this point unobtainable. Thus, we consider the following view of the Director, Transportation and Travel Management Division, General Services Administration (GSA), in his final report to the agency on Mr. Wilson's claim:

> The Government has a definite interest in resolving the matter, but since there was no Government representative on the scene at the time, the circumstances can only be determined as accurately as possible from those who were present. In this regard, it would seem that the next step would be for Mr. Wilson to present any statement or evidence he may have to establish a different net weight than that arrived at by the carrier.

The record shows that the carrier furnished copies of statement filed by the drivers and the carrier's local agent which identify the extraneous items as a copy machine and two boxes of office effects having a maximum weight of 200 pounds. The carrier revised the total billing weight down to 15,100 pounds and refunded $33.22 to the agency based upon this figure. We agree with GSA's observation that "the fact that the driver(s) apparently allowed contraband (personal non-revenue-property) to be weighed with the Wilsons' load, and did nothing to correct or explain their actions until asked to file statements several months later, may leave some question as to the reliability of such statements."

Nevertheless, these facts and explanations are themselves unrebutted in the record before us, and standing alone they are not unreasonable. Mr. Wilson has presented no substantive evidence beyond his allegation of an improper weight that refutes the carrier's explanation of unintended error. Nor has Mr. Wilson submitted any evidence to show that the actual weight of his household goods was any other figure than the revised weight determination established by the carrier. Further, we note from the driver's statement in the record that Mr. Wilson apparently shipped a boat and

a motorcycle. Both of these items are excluded from the definition of household goods and cannot be shipped at Government expense. See FTR paragraph 2-1.4h.

We are also mindful that Interstate Commerce Commission Regulations provide that the shipper or his representative can witness the original weigh or a reweigh for which he has a right to request. See 49 C.F.R. § 1056.6 (1978). Thus, Mr. Wilson could have witnessed the original weigh or could have requested and witnessed a reweigh.

Mr. Wilson says that the weight of his household goods shipment is incorrect; however he adds nothing to the evidential record before us to support his contention. Thus, on the basis of the administrative record before us, we conclude that Mr. Wilson has failed to meet his burden of proof under section 31.7 of Title 4, Code of Federal Regulations, and is liable for excess weight charges computed as set forth below. See *Robert W. Dolch,* B-197008, February 20, 1980.

Paragraph 2-8.3b(5) of the FTR prescribes a procedure for determining the charges payable by the employee for excess weight when the actual expense method of shipment is used. That paragraph reads as follows:

> (5) *Excess weight procedures.* When the weight of an employee's household goods exceeds the maximum weight limitation, the total quantity may be shipped on a Government bill of lading, but the employee shall reimburse the Government for the cost of transportation and other charges applicable to the excess weight, computed from the total charges according to the ratio of excess weight to the total weight of the shipment.

Applying the formula to the facts of Mr. Wilson's claim—using the revised figure of 15,100 pounds as the total weight, 4,100 pounds as the excess weight and $2,535.61 as the total charges—results in an excess weight charge of $688.42, computed as follows:

Step 1: Excess weight ÷ Total weight = Ratio to be applied
Step 2: Ratio × Total charges = Employee's share
Step 1: 4,100 ÷ 15,100 = 0.2715
Step 2: 0.2715 × $2,535.61 = $688.42

As our decision in the *Schmidt* case emphasized, the excess weight charge computation provided in paragraph 2-8.3b(5) of the FTR is predicated on the actual net excess weight as a percentage of the total weight of the shipment multiplied by the total charges. Thus, since the Federal Travel Regulations have the force and effect of law, the provision may not be waived or modified by the employing agency or the General Accounting Office regardless of the existence of any extenuating circumstances. We are unaware of any additional authority which would permit the agency to prorate transportation charges, origin charges, delivery or other shipment charges.

[B-207586]

Contracts—Modification—Beyond Scope of Contract—Subject to GAO Review

While contract modifications generally are the responsibility of the procuring agency in administering the contract, General Accounting Office will consider a pro-

test that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was competed.

Contracts—Modification—Scope of Contract Requirement—Obligation of Parties Unchanged—Advanced Technology Approaches—Price Unchanged

An agency's acceptance of a firm's post-award offer to change the way it will perform to meet its obligation—furnish a system that would meet various performance specifications—is not outside the contract's scope, even if that change reflects a more advanced or sophisticated approach, where there is no change in the nature of the obligation of either party to the contract.

Matter of: Cray Research, Inc., October 28, 1982:

Cray Research, Inc., protests the Department of the Navy's modification of contract N66032-79-C-0004, which had been awarded to Control Data Corporation (CDC) on July 5, 1979, for a large-scale scientific computer system. Cray contends that the modification, which permits CDC to substitute a new central processing unit (CPU) for the one already installed, exceeds the scope of the contract for which the competition was conducted. We deny the protest.[1]

Facts

The Navy solicited offers for the system, intended to provide the Navy Fleet with environmental predictions, through request for proposals (RFP) N66032-78-R-0060, issued on March 17, 1978. The RFP, which required offerors to meet numerous performance specifications, provided for four benchmark tests, labeled A through D. Benchmark tests B, C and D had to be demonstrated before award. Benchmark test A, however, which involved the system's multi-programming feature, did not have to be demonstrated until just before acceptance of the feature, which was to be 12 months after installation. The reason, according to the Navy, was that at the time the contract was to be awarded the competitors did not possess the technology necessary to meet the Navy's ultimate multi-programming requirements, which the benchmark reflected. (Both CDC and Cray, however, could meet the Navy's multi-programming need for the first few years of the system's life.)

CDC offered to meet the RFP's performance specifications with a system that included a Cyber 203 CPU. Cray was involved in the competition as a proposed subcontractor to another firm, which offered a Cray computer. Both offerors passed benchmark tests B, C and D, and the Navy then awarded the contract to CDC based on its lease with purchase option plan, which offered the lowest evaluated cost over the 10-year life of the system.

[1] Cray also filed suit in the United States District Court for the District of Columbia (Civil Action No. 82-2515) to enjoin the Navy from accepting delivery of the new CPU until we could resolve the protest. By order of October 6, 1982, the court denied Cray's request for an injunction.

The Navy accepted the CDC system in December, 1980. In February of 1981, CDC offered to substitute for the Cyber 203, which by then no longer was in production, a central processing unit from the firm's new product line, the Cyber 205, at a significant increase in cost to the Navy. The Navy rejected CDC's offer as outside the scope of the contract. The Navy relied on paragraph L.13.10 of the contract, entitled "Equipment Substitutions and Additions," which provides:

> The Government may replace any equipment components (other than the Central Processing Unit and Central Memory), covered by this contract with substitute equipment whether or not such substitute equipment is obtained from or manufactured by the contractor. * * *

In rejecting CDC's proposal on that provision, the Navy explained that the provision's intent "was to enable the Government to replace peripheral components only and not the central processing unit.* * *"

Benchmark test A was delayed, for various reasons, until August 1981. CDC could not pass the benchmark test principally because the Cyber 203 lacked adequate central memory, but also because it did not meet the processing time requirement. CDC then offered alternate remedies to avoid termination of the contract. The first alternative was to replace the Cyber 203 with a Cyber 205-422, a significantly more powerful unit, at the same monthly lease cost but with a substantially higher purchase price if the Navy were to exercise the purchase option. The second alternative was to add memory to the Cyber 203 at no additional cost to the Government.

The Navy refused the offer to replace the Cyber 203 with a Cyber 205 at additional cost. CDC responded with an offer to replace the Cyber 203 with a Cyber 205-411 at no additional cost to the Government. The Cyber 205-411 essentially is a scaled-down version of the Cyber 205-422. The Cyber 205-411 has certain features not available in the outdated Cyber 203, and includes fifty percent more central memory (1.5 million words as opposed to 1 million words). Neither CDC nor the Navy pursued the offer to increase the Cyber 203 memory.[2]

The Navy accepted the CDC's offer of a Cyber 205-411 by the contract modifications in issue. None of the contract's terms, conditions, or performance specifications otherwise were changed. The Navy relied on paragraph L.18.4 of the contract, which provides:

> Processing Time Not Obtained
>
> In the event the required processing time is not obtained, through no fault on the part of the Government, the contractor shall provide, at no additional charge to the Government for the life of the system, whatever hardware or software is necessary to meet the required processing time.

[2] In comments on the protest, CDC states that upon its own reevaluation this option was deemed disadvantageous since the memory hardware for the Cyber 203 was out of production, and since the Cyber 203 memory was manufactured in one million word increments whereas CDC had determined that an additional central memory of less than one-half million words was necessary to pass the benchmark test. Also, the processing time failure was considered relatively easy to correct.

Protest

Cray protests that the modification to the contract to permit substitution of the Cyber 205-411 for the Cyber 203 exceeds the contract's scope. The reason essentially is that the Navy, through the substitution, has acquired a significantly upgraded system without a competition—Cray contends that the Navy either must accept CDC's offer of an increase in the Cyber 203 memory or afford other firms the opportunity to compete against the Cyber 205 model. Cray complains that CDC in effect is being rewarded for the failure to pass benchmark test A by the Navy's purchase of the firm's newer line of CPUs.[3] In this respect, Cray asserts that in view of the economies that generally accompany new computer technology, the Navy is getting no bargain in paying the Cyber 203 price for a Cyber 205 model.

Cray points out that the Cyber 205-411 represents a technology that was not even available when the contract was awarded to CDC, and which can be expanded to accomplish functions more advanced than the Cyber 203 could. In fact, Cray complains, the Navy always desired these additional functions, but since they could not be accomplished by the technology current during the initial procurement, they could not be included as performance requirements in the solicitation; Cray implies that once CDC offered the Cyber 205-411 replacement, the Navy thus was pleased to accept the upgraded systems notwithstanding the legalities of the matter. The effective result of the Navy's action, Cray argues, is an unjustified sole-source purchase from CDC.

Cray also argues that the Navy's contract with CDC itself precluded the substitution in issue. Cray relies on paragraph L.13.10, quoted above, which Cray suggests specifically precludes replacement of the CPU or the central memory. Cray argues that paragraph L.18.4, which the Navy relied on in issuing the modification,

> quite obviously has nothing whatever to do with the performance of equipment that has never been accepted in the first place, and it certainly does not contemplate substitution of an entirely different mainframe CPU and CM [central memory] for the one required by the contract's specifications. Otherwise there would be no meaning to Paragraph L.13.10.1, which would in effect be written out of the contract.

Analysis

We generally will not consider a protest against a contract modification, since modifications involve contract administration, which is the responsibility of the procuring agency, not this Office. *Symbolic Displays, Incorporated,* B-182847, May 6, 1975, 71-1 CPD 278. We will, however, review an allegation that a modification went beyond the contract's scope and should have been the subject of a new procurement. The reason is that such a modification could be

[3] As stated above, the parameters of benchmark test A reflect multi-programming needs anticipated to arise further into the system's 10-year life. To date, CDC has been meeting the Navy's actual multi-programming requirement with the Cyber 203.

viewed as an attempt to circumvent the competitive procurement statutes. *Aero-Dri Corporation,* B-192274, October 26, 1978, 78-2 CPD 304.

We often have pointed out that it is not a simple matter to determine whether a changed contract is materially different from the competed contract so that the contract as modified should have been the subject of a new competition (unless a sole-source acquisition was justified). For guidance, we have looked to Court of Claims decisions involving the "cardinal changes" doctrine, which was developed by the courts to deal with contractors' claims that the Government had breached its contracts by ordering changes that were outside the scope of the changes clause. See *American Air Filter Company—DLA request for reconsideration,* 57 Comp. Gen. 567, 572 (1978), 78-1 CPD 443.

The Court has defined the basic standard for determining whether there has been a cardinal change as whether the modified job is essentially the same work for which the parties contracted. See *Air-A-Plane Corporation* v. *United States,* 408 F.2d 1030 (Ct. Cl. 1969). In applying this standard to situations where a firm that is not a party to the contract complains that a modification is not within the scope of the competition that initially was conducted, we have stated:

> * * * the question * * * is whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different. *American Air Filter Company, Inc.,* 57 Comp. Gen. 285, 286 (1978), 78-1 CPD 136.

Seldom have we found that an agency's modification of a contract was an improper exercise of administration under that standard. In *American Air Filter Company, Inc., supra,* we did sustain a protest against a modification to a contract for gas powered and fired heaters that permitted diesel powered and fired heaters. We noted that the modification necessitated numerous other changes in the contract, including the substitution of a diesel engine for a gasoline engine; a substantial increase in the weight of the heater; addition of an electrical starting system, new fuel control and combustor nozzle design; alteration of various performance characteristics; a 29 percent increase in the unit price; and the doubling of delivery time. The magnitude of the technical changes and their overall impact on the price and delivery provisions compelled the conclusion that the modified contract was so different from the competed contract that the Government should have solicited new proposals for its modified requirement.

Another example where we objected to a contract modification is our decision, *Webcraft Packaging, Division of Beatrice Foods Co.,* B-194087, August 14, 1979, 79-2 CPD 120. There, a contract had been awarded to supply what was, in effect, a "specialty" product, produced only by a few sources. When the awardee could not secure the item, the agency modified the contract to relax the specifica-

tions. Because the record was clear that considerably more firms would have entered a competition based on the relaxed specification than competed for the initial contract, so that the fields of competition differed significantly, we concluded that the agency should have resolicited for its needs.

Finally, in *Memorex Corporation,* 61 Comp. Gen. 42 (1981), 81-2 CPD 334, an agency awarded a contract for disk drives with an option to purchase an additional quantity. The agency exercised the option but refused delivery because of difficulties with the drives that had been installed. When the contractor complained that this refusal was a breach of contract, the parties resolved their differences by modifying the contract to substitute a new model disk drive for the option quantity; convert the option from an outright purchase to a five-year "lease to ownership"; and establish stringent performance requirements for the disk drives over the lease term. We found the modification improper essentially because the change from the outright purchase of bare machines to the acquisition of guaranteed service was a significant change in the nature of the thing procured so that the contract was substantially different from that originally competed. See *Memorex Corporation—Reconsideration,* B-200722.2, April 16, 1982, 82-1 CPD 349.

The reasoning in these decisions compels us to deny Cray's protest. In *American Air Filter,* the contract obligation as modified simply was substantially different than that contracted. In *Webcraft,* the relaxation of the specification on which the award had been based clearly compromised the competition that led to that award. In *Memorex Corporation,* the agency's modification resulted in a substantially different obligation than reflected in the awarded contract. In each case, then, there was more than merely the contractor's offer of a superior way to meet its obligation under the contract than the one contemplated when the contract was awarded. Rather, there was a substantial change in the nature of the contractor's fundamental obligation.

Here, however, the contract basically required CDC to furnish a system that would meet various performance specifications. In the original competition, CDC offered to meet these specifications with the Cyber 203 and that offer was deemed most advantageous to the Government of those received based on the solicitation's award criterion. The Navy then judged CDC capable of meeting the agency's needs at the offered price, and the award to the firm legally bound CDC to do so. We do not believe that an agency's acceptance of a firm's post-award offer to change the way it will perform to meet its obligation, even if that change reflects a more advanced or sophisticated approach, can be considered to be outside the contract's scope where there is no change in the nature of the obligation of either party to the contract. *See* 50 Comp. Gen. 540 (1971); *ConDiesel Mobile Equipment Division,* B-201568, September 29, 1982, 82-2 CPD 294.

Moreover, we fail to see how paragraph L.13.10 of CDC's contract, quoted above, precludes CDC's substitution of a Cyber 205-411 for the Cyber 203, as Cray argues. As the Navy explains, paragraph L.13.10 is a standard clause in contracts of this type to enable the Government unilaterally to replace or add equipment with the same or another manufacturer's in the event the original equipment wears out or for other reasons. The standard clause was amended for purposes of this procurement to preclude the Government's replacement of the CPU or the central memory. It does not on its face preclude an effort by the contractor to cure a performance problem. Regarding contract paragraph L.18.4, which the Navy relied on for the modification, that provision requires the contractor to provide "whatever hardware or software is necessary to meet the required processing time" if the contractor does not pass a benchmark test because of a processing time problem.

While the primary cause of CDC's failure to pass benchmark test A was the Cyber 203's lack of memory capacity, rather than the processing time requirement, the provision nonetheless does not preclude CDC from curing the deficiency with which the provision is concerned with an item that also enhances the overall system in other respects.

Finally, the suggestion that the users within the Navy were pleased to have the more advanced Cyber 205-411 instead of the Cyber 203 or, once it became clear that Cyber 203 could not pass benchmark test A, indeed encouraged the substitution rather than an increase in the memory of the out-of-production Cyber 203, does not make the action improper. The fact is that, as discussed, the change was within the contract's scope. The Government is not precluded from accepting a contractor's offer of a better or more advanced way to meet the contract's performance requirements than that contemplated when the contract was awarded, where the parties' basic contractual relationship is not otherwise altered. *See* 50 Comp. Gen., *supra,* where a change from electro-mechanical tuners and amplifiers to solid-state tuners, which interested the contracting agency because it would involve both cost savings and technical advantages, including improved performance and reliability, was within the contract's scope.

We note here that Cray is concerned that the change to the Cyber 205 model at this Navy location may afford CDC an advantage in future similar competitions at other locations. Even if that is so, however, a competitive advantage of that sort certainly is not unusual, and is not legally objectionable unless it is the result of unfair Government action. See *Honolulu Disposal Service, Inc.—Reconsideration,* 60 Comp. Gen. 642, 647 (1981), 81-2 CPD 126. A proper modification to a contract does not constitute unfair Government action. *Clifton Precision, Division of Litton Systems, Inc.,* B-207582, June 15, 1982, 82-1 CPD 590.

We conclude that the Navy's modification of CDC's contract to accept the Cyber 205-411 substitution was within the scope of the contract. The protest is denied.

[B-206942]

Transportation—Rates—Classification—Inapplicable—"Freight, All Kinds"—Class Rate in Quotation

Where formula for determining freight all kinds (FAK) rate offered in carrier's tender provides for taking percentage of applicable class 100 rate from appropriate tariff, there is no intention to further refer to the National Motor Freight Classification to determine each article's individual class rating because the formula clearly implies a class 100 basis and to do so would defeat the obvious purpose of the tender to offer Government FAK rates which are in the nature of commodity rates and designed to bypass the classification rating process.

Transportation—Rates—Section 22 Quotations—Construction—NMFC Rule Applicability—Weight Consideration in Shipping Same Commodity

Generally, for the same commodity, a carrier may not charge a shipper a greater amount to transport a lesser weight.

Matter of: Milne Truck Lines, Inc., October 29, 1982:

Milne Truck Lines, Inc. (Milne), requests our review of a General Services Administration (GSA) audit action concerning the carrier's bill No. 60-046896 for the transportation of a shipment of dry goods under Government Bill of Lading (GBL) No. K,7,376,583. GSA determined that Milne had overcharged the Government. Milne contends that it owes a lesser amount. We disagree with Milne.

GSA reports that Milne transferred the shipment to another carrier for delivery which produced higher transportation charges than if Milne had handled it as a single-line shipment. Milne does not dispute GSA's position that the carrier had the necessary operating authority to transport the shipment through to destination and, further, that reduced rates offered in a freight all kinds (FAK) tender, Rocky Mountain Motor Tariff Bureau, Inc., United States Government Quotation ICC RMB Q33-A (RMB Q33-A), are applicable to the shipment resulting in lower charges to the Government, although the delivering carrier did not participate in the tender. Apparently, Milne agrees that the shipment was misrouted, and that a partial refund of charges is due the Government. However, the carrier contends that the overcharges allegedly owed the Government are incorrect because of GSA's erroneous interpretation of the applicable tender.

GSA and Milne agree on the applicable tender provision for determining the rates. The applicable rate for this shipment is determined by the formula contained in item 1500 of RMB Q33-A. Item 500 expressly provides rates on FAK shipments weighing less

than 10,000 pounds. It provides that one must first determine the applicable class 100 rate (and minimum charge), including any applicable increase, from the appropriate Rocky Mountain tariff. The appropriate Rocky Mountain tariff, Tariff ICC RMB 332-B, contains various class rate tables, which include class 100 rates that, generally, decrease as the weight of shipments increases. The weight scale corresponding to the highest rate is 0—less than (LT) 500 pounds, then the weights increase, as follows: 500—LT 1,000; 1,000—LT 5,000; 5,000—LT 10,000 pounds, and so forth. Then, as shown in the following table, the FAK rate is based on a percentage of the applicable class 100 rate depending on the weight of the particular shipment. Note that the percentage here, also, generally, decreases as the weight increases. One of the issues here is which weight scale applies.

When the weight of shipment (in pounds)		The rate will be the percentage shown of the applicable class 100 rate (subject to Note 2)
is	but less than	
0	500	86
500	1,000	77½
1,000	2,000	77½
2,000	5,000	77½
5,000	10,000	72

Although the weight of the shipment was 4,405 pounds, GSA, in calculating the overcharge, based transportation charges on 72 percent of the applicable class 100 rate for the weight group of 5,000, but less than 10,000 pounds under item 1500 of RMB Q33-A. From the tariff, GSA used the class 100 rate that applied to the 5,000 pounds weight scale of $12.41 per 100 pounds, which has been increased 3 percent by a blanket increase supplement to $12.78 per 100 pounds. Taking 72 percent of the $12.78 class 100 rate basis results in a rate of $9.20 per 100 pounds is multiplied by the constructive weight of 5,000 pounds. A $10.58 fuel surcharge was added to the $460; the total charges were $470.58, which was then subtracted from charges of $880.99 previously paid by the Government, resulting in the overcharge claim of $410.41.

Milne raises two objections to this procedure. Milne contends that GSA is required by the tender to use the National Motor Freight Classification (NMFC) to determine the shipped articles individual class rating which when applied to this shipment results in higher charges than the charges based on GSA's interpretation of the tender. We explicitly rejected this contention, upholding GSA's interpretation of this identical tender provision, item 1500, in *Yellow Freight System, Inc.*, 61 Comp. Gen. 589 (B-202596, September 7, 1982). We stated that since the formula for determining the FAK rate offered in RMB Q33-A provided for taking a percentage of the applicable class 100 rate from an appropriate tariff,

there was no intention to further refer to the NMFC to determine each article's individual class rating. We stated that the formula clearly implies a class 100 basis and that use of the NMFC ratings was unnecessary and would defeat the obvious purpose of the tender to offer Government FAK rates which are in the nature of commodity rates and designed to bypass the classification rating process.

Thus, in our view, GSA has properly applied the tariff class 100 rate in this case.

Since the shipment's actual weight is 4,405 pounds, Milne has also questioned GSA's use of 5,000 pounds as the weight used for the class 100 rate and for the determination of the percentage of that rate which produced a $9.20 per 100 pounds rate used by GSA in calculating the charges.

Milne's tender provides that it is governed, except as otherwise provided, by the NMFC. In prior cases, in the absence of a tender provision barring their application, (and no such provision apparently is involved here), for example, as in *Yellow Freight Systems, Inc., supra,* where incorporation would have defeated the purpose of the tender, we have incorporated by reference NMFC rules, specifically NMFC Rule 595. See *American Farm Lines,* B-199927, May 12, 1981; *American Farm Lines,* B-198433, July 28, 1980.

Section 1 of NMFC Rule 595 states that:

> * * * In no case shall the charge for any shipment from and to the same points, via the same route of movement, be greater than the charge for a greater quantity of the same commodity in the same shipping form and subject to the the same packing provisions at the rate and weight applicable to such greater quantity of freight.

Simply stated, this rule provides that, generally, for the same commodity, a carrier may not charge a shipper a greater amount to transport a lesser weight. See *Regent Van and Storage, Inc.,* 51 Comp. Gen. 676 (1972); *cf.* maximum charge rule discussed in *American Farm Lines,* B-199927, May 12, 1981. For example, if under a given tariff the charge for a shipment of 3,000 pounds of a commodity would be $1,000, any shipment under 3,000 pounds must be transported for a charge no greater than $1,000.

Here, the use of the 5,000-pound constructive weight results in lower charges ($460) than charges applicable at the lesser actual weight (approximately $475) and, therefore, under the NMFC rule, GSA properly could base its calculations on the 5,000-pound weight.

We sustain GSA's audit action.

[B-208235]

Contracts—Two-Step Procurement—Step Two—Nonresponsive Bid—Deviation Apparent in Step One

A contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror. Therefore the acceptance of a firm's technical proposal under step one of a two-step proposal does not bind the Government to accept

that firm's step two bid if the bid is nonresponsive, even though the deviation from the terms of the solicitation was contained in the step-one technical proposal.

Contracts—Two-Step Procurement—Step Two—Terms and Conditions—Acceptance Time Limitation—Shorter Period Offered

Compliance with a mandatory minimum bid acceptance period established in an invitation for bids is a material requirement because a bidder offering a shorter acceptance period has an unfair advantage since it is not exposed to market place risks and fluctuations for as long as its competitors are. Therefore, a bid which takes exception to the requirement by offering a shorter acceptance period is nonresponsive and cannot be corrected.

Contracts—Two-Step Procurement—Step Two—Terms and Conditions—Defective Invitation—Cross-Referencing Necessity

A Standard Form 33 solicitation provision which provides that a 60-day bid acceptance period will apply unless the bidder specifies a different number of days should have been cross-referenced with another solicitation provision which provides that bids with acceptance periods of fewer than 45 days would be considered nonresponsive. The failure to cross-refer was not in this case grossly misleading and, therefore, the cancellation of the solicitation is not required.

Matter of: International Medical Industries, Inc., October 29, 1982:

International Medical Industries, Inc. protests the award of a contract to Southeast Security Systems, Inc. by the Veterans Administration under invitation for bids (IFB) No. 509-38-82, the second step of a two-step advertised procurement. The Veterans Administration rejected International's bid as nonresponsive because the bid designated a shorter bid acceptance period than was required by the solicitation. We deny the protest.

Request for technical proposals (RFTP) No. 509-24-82, step one of this two-step procurement, was issued for the installation of a security surveillance system at the Veterans Administration Medical Center in Augusta, Georgia. The RFTP contained the essential terms and conditions of the anticipated step two solicitation, including a required bid acceptance period of 45 days. The technical proposal that International submitted in response to the RFTP designated a *bid* acceptance period of 30 days. The Administration found the proposal to be technically acceptable and invited International to submit a bid under step two of the procurement. International submitted a low bid of $84,612. The Administration rejected the bid, however, because it provided a 30-day bid acceptance period and awarded a contract to Southeast Security at a price of $89,126.

International cites in its favor decisions in which we have held that where there is some ambiguity associated with a step-two bid, a presumption of responsiveness exists with respect to the bid in view of the approval of step-one proposal. See, *e.g., Federal Aviation Administration,* B-193238, February 27, 1979, 79-1 CPD 136. This presumption, however, is not applicable here because there is

absolutely no ambiguity concerning the responsiveness of International's bid: the bid clearly deviates from the material terms of the solicitation by providing 30 days for its acceptance period.

International then concedes that its bid was nonresponsive but contends that the rejection of its bid was improper because, under the doctrines of finality and equitable estoppel, the Government was bound by the contracting officer's approval of the technical proposal it submitted in step one to accept its low step-two bid with the 30-day acceptance period. We reject this contention. Two-step formal advertising is a variation of standard formal advertising procedures designed to maximize competition when available specifications are not sufficiently definite to permit competition on the basis of price only. Step one is similar to a negotiated procurement in that unpriced technical proposals are submitted for evaluation. Those offerors whose proposals are found to be technically acceptable are invited to submit bids in step two on the basis of their technical proposals and the advertised terms and conditions set forth in the step-two invitation for bids. Those step-two terms and conditions cannot be considered to have been modified by the step-one evaluation, which is limited to consideration of what is proposed technically. Therefore, bidders must be charged with notice that the terms and conditions of a step-two solicitation will govern the ultimate award, and since a step-two competition is nothing more than a formally advertised procurement with the competition limited to those proposing technically acceptable approaches during step one, the standard rules of bid responsiveness and evaluation must apply.

As a general rule, a contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror; award to any other party is illegal. *Redifon Computers Limited—Reconsideration,* B-186691, June 30, 1977, 77-1 CPD 463. Therefore, a finding that a firm's technical proposal under step one of a two-step procurement is acceptable cannot bind the Government to accept the firm's bid under step two if that bid is nonresponsive to the terms and conditions of the invitation for bid, even though the exception to the terms of the solicitation was contained in the step-one proposal that was found to be acceptable. See *American Telephone and Telegraph Company,* B-193454, May 21, 1979, 79-1 CPD 365.

The protester next argues that the deviation should have been waived by the Administration under Federal Procurement Regulations § 1-2.405 (1964 ed.) as a minor informality, particularly in view of the fact that the Government actually awarded the contract well within 30 days of bid opening. We have consistently held, however, that a provision in an IFB which requires that a bid remain available for acceptance by the Government for a prescribed period of time is a material requirement and that the failure to meet such a requirement renders a bid nonresponsive. See,

e.g., Miles Metal Corporation, 54 Comp. Gen. 750 (1975), 75-1 CPD 145; 48 Comp. Gen. 19 (1968); compare, *Professional Materials Hauling Co., Inc.,* B-205969, April 2, 1982, 82-1 CPD 297 (where the IFB did not establish a minimum bid acceptance period). To hold otherwise would afford the bidder that offered a shorter bid acceptance than required to obtain an unfair advantage over its competitors because that bidder is exposed to the risk of the market place for a shorter period of time and therefore is taking less risk than the other bidders. *Esko & Young, Inc.,* B-204053, January 4, 1982, 82-1 CPD 5; *Hemet Valley Flying Service Co., Inc.—Reconsideration,* B-191390, July 26, 1978, 78-2 CPD 73. Mistake in bid procedures cannot be used to transform a nonresponsive bid into a responsive bid. *Goodway Graphics of Virginia, Inc.—Reconsideration,* B-193193, May 14, 1979, 79-1 CPD 342. Therefore, even though the Administration actually awarded a contract within the shorter acceptance offered by International, the bid was properly rejected as nonresponsive.

Last, the protester contends that the rejection of its bid is improper because the solicitation provisions concerning the bid acceptance period are defective. The first page of the IFB incorporates Standard Form (SF) 33, "Solicitation, Offer and Award" which contained on page one the following standard language concerning the bid acceptance period:

> * * * the undersigned agrees, if this offer is accepted within — calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

International inserted "30" in the space provided in this clause. The solicitation also contains a "Special Conditions" including at page 7, the following:

> Bid Acceptance Period:
> Bids offering less than forty-five (45) days for acceptance by the Government from the date set for opening will be considered non-responsive and rejected.

We have stated that where one provision of an invitation contains language specifying or inviting the designation of a bid acceptance period and another provision located elsewhere in the invitation sets forth a minimum bid acceptance period, the two provisions should be cross-referred to specifically direct the bidders' attention to the fact that the insertion of a shorter period will cause the bid to be rejected. *See* 47 Comp. Gen. 769 (1968); B-154793, September 21, 1964. On two occasions, we have recommended that offending solicitations be canceled. *See* 52 Comp. Gen. 842 (1973) and *Hild Floor Machine Co., Inc.,* B-196419, February 19, 1980, 80-1 CPD 140. These decisions constitute an exception to the general rule that bidders are expected to scrutinize carefully the entire solicitation package, including the bid acceptance provisions, and respond accordingly. Therefore, we believe they should be narrowly construed. In both decisions the solicitations contained the same SF

33 provision used by the Administration and provided elsewhere that bids offering fewer than 90 days would be considered nonresponsive. In both cases, most bidders did not insert a number of days in the SF 33 clause and, consequently, nearly all bidders were found nonresponsive, thus depriving the Government of the benefit of competition in the procurements involved. In the course of sustaining the protests, we attached particular importance to the fact that bidders were not alerted that the two acceptance period clauses "had to be considered together and affirmative action taken with respect thereto," and that bidders were consequently ensnared into a state of nonresponsiveness. 52 Comp. Gen. 842, 845. We also stated that only a grossly misleading invitation would have caused almost all bidders to be nonresponsive.

In this case, the self-executing SF 33 period (60 days) exceeded the minimum period required (45 days). Thus, bidders were not ensnared into nonresponsiveness as they were in 52 Comp. Gen. 842, and *Hild Floor Machine;* rather, only by affirmative action concerning bid acceptance period could a bidder become nonresponsive. Moreover, International was the only one of the six firms that submitted bids to be found nonresponsive. Thus, although the IFB should have been cross-referenced to reduce the possibility of misinterpretation, we find that the IFB is not fatally defective.

The protest is denied. By letter of this date, however, we are recommending that the Administrator take action to ensure that bid acceptance period clauses are cross-referred in future procurements.

[B-206980]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Assigned to Government Quarters—Partial Allowance Entitlement—Single Quarters Assigned—Cost/Value Consideration

A service member who is single, without dependents, was assigned to a Government-leased apartment. While the apartment did not qualify as family quarters because of size, it still substantially exceeded the single member housing standards of the Air Force. In line with the purpose for which a basic allowance for quarters at the partial rate (37 U.S.C. 1009) is payable and the reasoning in 56 Comp. Gen. 894, since the member's housing here is of a significantly higher value than would normally be assigned him, the member is not entitled to a basic allowance for quarters at the partial rate while so assigned. 56 Comp. Gen. 894, expanded.

Matter of: Sergeant Luis C. Armendariz, USAF, November 4, 1982:

This action is in response to a request for a decision from the Accounting and Finance Officer, Travis Air Force Base, concerning the entitlement of Sergeant Luis C. Armendariz, USAF, to receive a basic allowance for quarters at the partial rate while occupying Government-leased quarters. This matter has been assigned control number DO-AF-1387 by the Department of Defense Military Pay and Allowance Committee.

The question asked is whether a basic allowance for quarters at the partial rate is payable to a single member when he is assigned to quarters which substantially exceed the minimum criteria for single-type housing but are not considered adequate by the service concerned for classification as family-type quarters because they include only one bedroom. In this circumstance we hold that basic allowance for quarters at the partial rate is not payable.

According to the submission, in January 1980 Sergeant Armendariz, who is single and is a military recruiter, was assigned to a Government-leased, one-bedroom apartment in Modesto, California. The authorized Air Force on-base quarters for a single sergeant would contain a minimum of 135 square feet, would probably consist of a room shared with another member, would have no kitchen facilities, and would have only a central latrine. The leased one-bedroom apartment has approximately 600 square feet of space and includes a bedroom, living room, kitchen and bathroom.

It is pointed out that while the leased apartment is much larger than is the typical quarters of a single member, it is not considered to be adequate by Air Force standards for accompanied personnel, since as a rule such personnel are not assigned to one-bedroom quarters.

It is also pointed out that the cost to the Government of leasing Sergeant Armendariz's apartment is $225 a month. If he had secured his own housing the maximum basic allowance for quarters which he could receive at that time and at that location would

have been $123.90. In view of the fact that the apartment cost the Government more than the basic allowance for quarters otherwise payable, doubt is expressed as to whether Sergeant Armendariz is entitled to the partial basic allowance for quarters.

Subsection 403(a) of title 37, United States Code, authorizes payment of a basic allowance for quarters, but subsections 403 (b) and (c) limit that entitlement to those who are not assigned adequate Government quarters and those not on field or sea duty.

Section 1009(c)(2) of title 37, United States Code (previously section 1009(d)), authorizes a partial basic allowance for quarters as follows:

> Under regulations prescribed by the President, whenever the President exercises his authority under paragraph (1) of this subsection to allocate the elements of compensation specified in subsection (a) of this section on a percentage basis other than an equal percentage basis, he may pay to each member without dependents who, under section 403 (b) or (c) of this title, is not entitled to receive a basic allowance for quarters, an amount equal to the difference between (1) the amount of such increase under paragraph (1) of this subsection in the amount of the basic allowance for quarters which, but for section 403 (b) or (c) of this title, such member would be entitled to receive, and (2) the amount by which such basic allowance for quarters would have been increased under subsection (b)(3) of this subsection if the President had not exercised such authority.

The legislative history of 37 U.S.C. 1009(d) shows that its purpose was to authorize payment of a partial rate basic allowance for quarters to members without dependents when they were not entitled to a regular basic allowance for quarters because they were assigned to single-type Government quarters. This was in recognition of the fact that the value of Government-furnished bachelor quarters, barracks, and quarters furnished in the field and at sea are of lesser value than the basic allowance for quarters the single member loses when he is required to occupy such quarters.

In 56 Comp. Gen. 894 (1977), question 3 related to whether a single member without dependents was entitled to the partial rate when assigned to family-type quarters. That question was answered in the negative. We pointed out that Congress enacted those provisions because the value of Government single quarters was substantially less than the value of family quarters. Thus, if a single member is assigned to family-type quarters he is not entitled to the partial rate since he is receiving the benefit of the higher value housing.

In the present case, while the Government-leased housing was not family-type housing, it was housing of a significantly higher value. Both the cost to the Government and accommodations provided were greater than that which would normally be authorized for single members without dependents. As we found in the case where a single member is assigned family-type quarters, the partial quarters allowance was not intended to apply to a member who is receiving the benefit of quarters substantially exceeding the value of ordinary bachelor quarters.

Therefore, while Sergeant Armendariz, as a single member, occupies an apartment rented by the Government for his use while on recruiting duty, he is not entitled to a basic allowance for quarters at the partial rate.

[B-207034]

Courts—Jurors—Fees—Military Personnel in State Courts—Pay Deduction

A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours.

Matter of: Sergeant Richard P. Stevenson, USAF, November 4, 1982:

Captain H. L. Bean, Accounting and Finance Officer, Mountain Home Air Force Base, Idaho, requests an advance decision as to whether a military member may keep fees received for serving as a juror in a State court while he was receiving full military pay and allowances. We conclude that a military member not in leave status may not receive compensation from a State court for the time during which he is on active duty and receiving full military pay and allowances.

This case was forwarded to us by the Air Force Accounting and Finance Center and has been assigned submission No. DO-AF-1388 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Richard P. Stevenson, USAF, served as a juror in January, 1982, in a district court of the State of Idaho. For his services Sergeant Stevenson received $35 in fees and $0.80 in transportation expense. The Accounting and Finance Office subsequently withheld $35 from Sergeant Stevenson's pay and placed it in a suspense account until it is determined whether payment of the jury fees may be accepted by the member.

The Accounting and Finance Officer notes that in a publication of April 18, 1980, issued by the Air Force Accounting and Finance Center, it is indicated that jury fees could be retained by the member. However, the opinion was expressed by Judge Advocate personnel that the fees could not be retained.

The information we have indicates that Sergeant Stevenson was not in a leave status during the period he performed jury duty. We assume that the jury duty was performed during his normal duty hours. Thus, we have a situation in which the member, while receiving active duty pay and allowances, is excused from performing his normal duties to perform jury duty. The question is whether he may keep compensation paid by the court.

While no specific statute deals with this situation, we find that the case is controlled by the established principle that the earnings of an employee in excess of his regular compensation which are gained in the course of or in connection with his services belong to the employer. We have consistently held this rule to be applicable to Federal employees and members of the uniformed services. Amounts received in addition to pay for services as a military member are received for the United States and should be paid into the Treasury. B-200013, April 15, 1981; 49 Comp. Gen. 819 (1979); 37 *id.* 29 (1957).

In the absence of specific authority for retention of jury fees, members of the uniformed services who do perform jury duty and who are not in a leave status should turn the amounts received into the Treasury. This result is similar to the result in the case of civilian employees who are authorized court leave to perform jury duty (5 U.S.C. 6322) but have the jury fees (as distinguished from expenses) credited against the pay to which they are otherwise entitled (5 U.S.C. 5515). See 52 Comp. Gen. 325 (1972).

Accordingly, Sergeant Stevenson is not entitled to the amount withheld from his pay equal to the amount received for the jury duty. The voucher may not be paid and will be retained here.

[B-209345]

Contracts—Protests—Authority to Consider—Federal Reserve System—Member Bank Contracts

General Accounting Office (GAO) will not decide protest against contract award by Federal Reserve Bank, despite GAO audit authority, because GAO account settlement authority (the basis of GAO bid protest jurisdiction) does not extend to Federal Reserve System banks.

Matter of: Northern Courier Service, Inc., November 9, 1982:

Northern Courier Service, Inc., protests the award of a contract by the Federal Reserve Bank of Minneapolis.

Our bid protest jurisdiction is based on our authority to adjust and settle accounts and to certify balances in the accounts of accountable officers under Pub. L. No. 97-258, § 3526, 96 Stat. 964 (1982) (to be codified at 31 U.S.C. § 3526; formerly 31 U.S.C. §§ 71, 72 and 74 (1976)). This section, derived from the Dockery Act of 1894, sets forth the limits of our account settlement authority. We are authorized to settle the "public accounts" of Government agencies, departments, or independent establishments, as these terms are further defined by law, but the definitions explicitly exclude Government corporations or agencies subject to the Government Corporation Control Act. Pub. L. No. 97-358, § 3501, 96 Stat. 959 (1982) (to be codified at 31 U.S.C. § 3501; formerly 31 U.S.C. § 65a (1976)). In other words, unless a later enactment specifically subjects an entity not covered under the Dockery Act to our settlement authority, we do not have such authority.

The member banks of the Federal Reserve System clearly do not fit under the above-mentioned authorities. Section 9 of the Federal Reserve Act, 12 U.S.C. § 330 (1976), states:

> * * * Subject to the provisions of this chapter and to the regulations of the [Federal Reserve] board made pursuant thereto, any bank becoming a member of the Federal reserve system shall retain its full charter and statutory rights as a State bank or trust company, and may continue to exercise all corporate powers granted it by the State in which it was created * * *

As a State-chartered corporation, therefore, a Federal Reserve bank is entitled, like any other corporation, to sue and be sued, to conduct its ordinary house-keeping affairs as it sees fit and to make business decisions involving the expenditure of its own funds which are not subject to further review.

The protester cites, as grounds for the assumption of jurisdiction by GAO, a 1978 amendment to the Federal Banking Agency Audit Act, Pub. L. No. 97-258, § 714, 96 Stat. 890 (1982) (to be codifed at 31 U.S.C. § 714; formerly 31 U.S.C. § 67(e)(1)(b) (Supp. III 1979)). Under that amendment the Comptroller General is now required to *audit* the transactions of the "Federal Reserve Board, all Federal Reserve banks, and their branches and facilities." Paragraph (2) of that subsection provides that Federal Resreve banks, among others, are considered to be agencies *"for purposes of this subsection."* [Italic supplied.]

But audit authority is quite different from settlement authority, particularly with respect to the consequences of a finding that a financial transaction was improper. With account settlement authority, the Comptroller General can take exception to an improper transaction and hold the certifying officer or relevant official personally liable for the amount of money improperly expended. Moreover, his decisions on the expenditures for appropriated funds are binding on the executive branch. Under the new audit authority conferred by the 1978 amendment to the Federal Banking Agency Audit Act, the Comptroller General is required to report his findings to the Congress, but is not given the power to take exception to the accounts of the entities he audits.

In view of the above, we conclude that our account settlement authority does not extend to Federal Reserve System banks and, therefore, we have no authority to decide to protest against a contract award by such banks. See *Gamco Industries,* B-198145, March 28, 1980, 80-1 CPD 235.

The protest is dismissed.

[B-206658]

Records—Retention—General Records Schedule 2—Time and Attendance—Three-Year Period Extension—Agency Requests *v.* Schedule Change

Federal Aviation Authority questions whether time and attendance (T&A) reports should be retained more than 3 years in order to adjudicate claims subject to 6-year statute of limitations. Without additional information, we would not recommend any change in the General Records Schedule 2 with regard to extending retention period for T&A reports from 3 to 6 years.

Records—Retention—Extension of Period—Claim Settlement Pending

Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from General Accounting Office. See 44 U.S.C. 3309.

Records—Recordkeeping Requirements—Fair Labor Standards Act—Claims Accruing Beyond 3 Years—Denial Propriety—Absence-of-Records Basis

Where an agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitation, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies.

Matter of: Retention of Time and Attendance Records, November 10, 1982:

The issues in this decision are (1) whether time and attendance (T&A) reports should be retained 6 years instead of the present 3 years in order to adjudicate claims such as overtime under the Fair Labor Standards Act (FLSA), and (2) if such records are kept only 3 years, whether claims beyond 3 years may be denied due to the absence of official records. We hold that (1) T&A reports need not be kept more than 3 years except where claims have been filed, but that (2) claims beyond 3 years may not be dismissed because T&A reports are no longer available.

This decision is in reponse to a request from George B. Fineberg, Chief, Financial Systems Division, Office of Accounting, Federal Aviation Administration (FAA). The request states that according to the General Records Schedule 2 issued by the General Services Administration (GSA), T&A reports are to be destroyed after General Accounting Office (GAO) audit or 3 years, whichever is sooner. However, T&A reports are used in adjudicating claims such as retroactive entitlement to overtime under the FLSA, the FAA notes

that such information would be unavailable for claims extending beyond 3 years. See, for example, B-200112, December 21, 1981, involving retroactive coverage under the FLSA for certain FAA employees subject to a 6-year statute of limitations. Therefore, the FAA questions (1) whether T&A files should be destroyed in accordance with the GSA schedule without regard to claims which have or may be submitted for up to a 6-year period, and (2) if such records are destroyed, whether claims for more than 3 years may be denied because official files to adjudicate the claim are no longer available.

Under the provisions of 44 U.S.C. Chapter 31, Federal agencies shall maintain adequate records of its activities, and under the provisions of 44 U.S.C. Chapter 33, certain records shall be disposed of according to schedules agreed to by the Administrator of General Services. See 44 U.S.C. § 3303a (1976) and 41 C.F.R. Part 101, Subpart 101-11.4 (1981). The General Records Schedule 2 (Payrolling and Pay Administration Records) issued pursuant to 41 C.F.R. § 101-11.404-2 provides the disposition schedule for certain types of records common to many or all agencies including T&A report files (Standard Form 1130 or equivalent) which, under the Schedule, are to destroyed after GAO audit or when 3 years old, whichever is sooner.

These records disposition schedules are developed by the National Archives and Records Service (NARS) of GSA following consultation with GAO and other appropriate agencies (41 C.F.R. § 101-11.404-2(b)), and, in fact, the question of the retention of T&A reports for 6 years, instead of 3 years because of claims under the FLSA, has been the subject of recent inquiries by NARS to our Office in 1979 and 1981. In our responses to the 1979 inquiry from NARS, we recommended that it issue specific exemptions to those agencies which had requested a 6-year retention period for T&A reports, and that it monitor the experience to determine the usefulness of retaining T&A reports an additional 3 years. In 1981, NARS again requested extension of the T&A reports retention period to 6 years but without providing any information on the usefulness of T&A reports in adjudicating claims and the usefulness of the longer retention period. We advised NARS that without that additional information we could not determine whether T&A reports should be retained an additional 3 years.

In some situations T&A reports may not be determinative of an employee's entitlement to overtime under the FLSA in prior years since generally T&A reports will reflect only the regular and overtime hours for which the employee is being paid. Thus, if an employee claims overtime under the FLSA for hours of work not compensable under title 5, United States Code, such hours probably will not be reflected on prior T&A reports, and these reports would have limited usefulness in adjudicating these claims. Other considerations in determining whether to retain T&A reports an addi-

tional 3 years are the cost of storage and/or microfilming the T&A reports and whether the cost is justified in view of the questionable value of using such records in adjudicating claims.

As we advised NARS in 1979 and 1981, we have no objection to permitting agencies which request extensions to retain T&A reports for 6 years, but in the absence of additional information justifying the need for a permanent extension to 6 years, we would not recommend any change in the General Records Schedule 2 with regard to the retention of T&A reports at this time. If the FAA or any other agency wishes to experiment with a 6-year retention period, they should request an extension of time from NARS. See 41 C.F.R. § 101-11.406-8.

We should point out that the requirement to destroy T&A reports after 3 years pursuant to the schedule does not apply to situations where claims have been filed by or against the Government. Such records must be retained until the claims have been settled, unless written approval is received from our Office. 44 U.S.C. § 3309 (1976).

A second question posed by the FAA is, if T&A reports are retained only 3 years, may an agency reject a claim more than 3 years old on the basis that agency records are no longer available? For the reasons stated below, we hold that agencies may not treat claims in this manner.

First, if agencies are permitted to deny claims filed more than 3 years after the claim accrues based on the absence of official records, the effect will be to reduce the statute of limitations from 6 years to 3 years. See 31 U.S.C. § 71a (1976). In addition, agencies cannot argue that *no* records are available since the Individual Pay Card (Form 1127), which is kept 56 years, indicates earnings and deductions in dollar amounts on a pay period basis.

Finally, the Fair Labor Standards Act imposes on an employer the requirement to keep adequate records. 29 U.S.C. § 211(c) and 29 C.F.R. Part 516 (1981). The FLSA regulations issued by the Office of Personnel Management (5 C.F.R. Part 551 (1982)) do not impose upon Federal agencies any specific recordkeeping requirements, but our decisions have applied the burden of proof recognized in Federal courts where the employer has failed to meet his statutory duty to keep accurate records. See *Civilian Nurses,* 61 Comp. Gen. 174 (1981); 60 *id.* 523 (1981); *Christine D. Taliaferro,* B-199783, March 9, 1981. In those decisions we have held that where the employee presents acceptable evidence that he worked the overtime and was not compensated, the burden of proof shifts to the employer. Where the agency has failed to keep accurate records, the employee's claim must be paid. *Taliaferro, supra.*

We note that in the proposed regulations issued by OPM, agencies would have been required to keep "complete and accurate records of all hours worked by its employees" for a period of 6 years. 45 Fed. Reg. 49580, 49582, July 25, 1980. However, when the

final regulations were issued, this recordkeeping requirement was removed based, in part, on advice from our Office that the present records retention schedule was sufficient for our use in settling pay claims. 45 Fed. Reg. 85659, 85660, December 30, 1980. However, in view of our recent decisions, OPM may wish to reconsider and impose a specific recordkeeping requirement on Federal agencies. See also our report HRD-81-60, May 28, 1981, recommending statutory and administrative changes to strengthen employer recordkeeping in private sector FLSA cases.

[B-207967]

Transportation—Household Effects—What Constitutes—Bicycle/Utility Trailers

Employee who was transferred to a new duty station claims reimbursement for the cost of transporting a bicycle trailer to his new residence and for temporary storage of the trailer prior to shipment. The costs of transporting and storing a bicycle trailer are reimbursable by the Government since such a trailer may properly be categorized as "household goods," as defined in para. 2-1.4h of the Federal Travel Regulations (FTR). Moreover, the FTR does not specifically prohibit the shipment of a bicycle trailer as household goods.

Matter of: Guy T. Easter—Reimbursement For Shipment and Storage of Utility Trailer, November 16, 1982:

This decision is in response to a request from Mr. Larry C. Greer, Acting Regional Finance Officer with the Bureau of the Reclamation, United States Department of the Interior, in Denver, Colorado, concerning the propriety of reimbursing Mr. Guy T. Easter for the cost of moving and storing a utility trailer incident to his transfer. The issue presented is whether a bicycle trailer is included in the definition of "household goods" and therefore eligible to be transported at Government expense. For the reasons stated below, a bicycle trailer may be considered as household goods, as that term is defined in the applicable regulations. Therefore, the voucher submitted by Mr. Easter may be certified for payment if otherwise correct.

Mr. Easter, an employee of the Bureau of Reclamation, was transferred from Walla Walla, Washington, to Guernsey, Wyoming, effective March 11, 1982. Mr. Easter was authorized relocation expenses, including the cost of transporting his household goods from his home in Milton-Freewater, Oregon, to his new duty station in Guernsey. Mr. Easter arranged to have his household goods shipped to Guernsey by a commercial carrier on March 5, 1982. Among those household goods was a 3 foot by 3 foot trailer weighing 720 pounds, which has been alternately referred to as a "utility" trailer (by the Bureau of Reclamation) and a "bicycle" trailer (by Mr. Easter).

In processing Mr. Easter's travel and transportation voucher, the Bureau of Reclamation determined that the trailer in question was

not "household goods," as defined by the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), paragraph 2-1.4h. Therefore, the Bureau concluded that Mr. Easter should not have been reimbursed for the cost of transporting his trailer. Since Mr. Easter received a travel advance, the Bureau issued a Bill for Collection in the amount of $302.51 in an effort to recoup the cost of transporting the trailer.

Instead of paying the Bureau as directed on May 28, 1982, Mr. Easter submitted a reclaim voucher requesting that the Government reconsider its disallowance of the rejected portion of his claim. Mr. Easter's appeal was based on his classification of the trailer as a bicycle trailer, and his belief that "bicycles are a part of household goods and a bicycle trailer, the purpose of which is to haul the bicycles, should be covered under household goods."

Prior to making its determination, the Bureau has asked this Office to rule on the propriety of paying Mr. Easter's claim. We conclude that the reclaim voucher submitted by Mr. Easter may be certified for payment.

Section 5724 of Title 5, United States Code (1976), provides that an employee permanently transferred from one official duty station to another in the Government's interest is entitled to transportation (including temporary storage) of his household goods and personal effects at Government expense, or reimbursement therefor, subject to such conditions and limitations as the head of the agency concerned may prescribe. Some uncertainty has arisen concerning the types of goods for which transportation is authorized under section 5724, since the provision itself contains no definition of the term "household goods."

In an effort to clarify this matter, the General Services Administration provided a definition of "household goods" in the regulation it promulgated as part of the Federal Travel Regulations in order to implement section 5724. Paragraph 2-1.4h of the FTR defines household goods as personal property which may be transported legally in interstate commerce and which belongs to an employee and his immediate family at the time of shipment. Specifically, the provision states that the term "household goods" "includes household furnishings, equipment and appliances, furniture, clothing, books, and similar property. It does not include * * * such items as automobiles, station wagons, motorcycles and similar motor vehicles, airplanes, mobile homes, camper trailers, boats, birds, pets, livestock, cordwood [or] building materials * * *."

In this case, Mr. Easter states that his trailer should not be categorized along with cars, boats, mobile homes and camper trailers (and thus, should not be excluded from the category of "household hoods") since it is not motorized and by law does not require a license plate. (The agency disputes the latter claim, stating that a trailer license is indeed required in Wyoming.) Mr. Easter further maintains that since he uses his trailer to haul bicycles, which

should be classifed as "household goods," for recreational purposes, the trailer should be viewed as "household goods" as well. We agree.

We have previously stated that "household goods and personal effects" are general terms, not lending themselves to precise definition. The terms vary in scope depending upon the context in which they are used. It has been our view, however, that in ordinary and usual usage, they refer to particular kinds of personal property associated with the home and person. As generally understood, the term "household goods" refers to furniture and furnishings or equipment used in and about a place of residence for the comfort and accommodation of the members of a family. 53 Comp. Gen. 159 (1973); 52 *id.* 479 (1973).

We have held that certain items in the nature of personal recreation equipment may come within the definition of household goods. See *Henry L. Dupray,* B-191724, March 29, 1979, in which we allowed reimbursement for the shipment of an employee's portable swimming pool. Notwithstanding the lack of preciseness of the term, however, we note that various items which may be used by employees for recreational purposes, such as boats, airplanes, motorcycles and camper trailers, are specifically excluded from the scope of "household goods" under paragraph 2-1.4h of the FTR. See 44 Comp. Gen. 65 (1964). In this regard, we note that the applicable regulations contain no specific language which would prohibit shipment of a bicycle or utility trailer as household goods.

Although we have not issued a decision specifically addressing the transportation of bicycles, we believe that bicycles owned by an employee are the type of personal property so closely associated with his home and person as to come within the scope of the term "household goods." Furthermore, we believe that a trailer used by an employee to haul personal recreational equipment such as bicycles may also be defined as household goods, since the purpose of such a trailer is to facilitate the employee's use of his recreational equipment. The fact that a trailer may or may not be licensed is not necessarily relevant to such a determination. Rather, in categorizing an item, we must look primarily to the character of that particular good. In this case, we have found a sufficient connection between the employee's trailer and his residence and family to justify classification of the trailer as "household goods." In this regard, see also our decision B-154294, June 26, 1964, in which we allowed reimbursement for the shipment of an employee's luggage trailer.

Although Mr. Easter was authorized transportation of 11,000 pounds of household goods in connection with his transfer, he actually shipped only 5,860 pounds of furnishings to Guernsey, including the trailer in question. Since Mr. Easter's furnishings were thus well under the 11,000 pound limit, we have no objection to reimbursing him for shipment of the 720 pound bicycle trailer.

Accordingly, the voucher submitted by Mr. Easter may be certified for payment if otherwise correct.

[B-208016]

Mileage—Travel by Privately Owned Automobile—Between Residence and Terminal—To Closest Serviceable Airport—Reimbursement Limitation—Taxicab One-Way Fare

Employee was driven to and picked up from airport when he went on temporary duty travel. Airport used was 45 miles from employee's home and 33 miles from duty station. There was a closer airport in same town as duty station, but appropriate air carrier service was not available. Use of commercial bus to airport actually used had been found to be neither convenient nor cost effective by transportation officer. Fact that airport used was not the closest to duty station does not preclude reimbursement of round-trip mileage under Volume 2 of the Joint Travel Regulations, para. C4657, or under Federal Travel Regulations para. 1-4.2(c)(1), where airport used was nearest serviceable airport offering appropriate carrier service. Reimbursement is still limited to no more than one-way taxi fare. B-177562, May 21, 1973, is distinguished.

Matter of: Ralph Palmer—Mileage Between Home and Common Carrier Terminal, November 16, 1982:

The Finance and Accounting Officer, Pine Bluff Arsenal, Arkansas, requests an advance decision concerning an employee's claim to reimbursement for mileage for round-trip travel by a privately owned vehicle (POV) from the employee's home in Pine Bluff, Arkansas, to the air terminal in Little Rock, Arkansas, en route to Rock Island, Illinois, for temporary duty. The question is whether the full 90-mile round trip is reimbursable, in light of the fact that another airfield was located much closer, and other common carrier service was available to Little Rock. We hold that the claim is payable because the Little Rock airport is the nearest airport having the needed carrier service, and travel by POV was reasonable and advantageous to the Government.

The case was forwarded to us through the Per Diem, Travel and Transportation Allowance Committee, and was assigned PDTATAC Control No. 82-16.

Mr. Ralph Palmer, a civilian employee of the Pine Bluff Arsenal, was ordered to travel on temporary duty from his home in Pine Bluff, Arkansas, to Rock Island, Illinois, for a stay of 6 days. Mr. Palmer's wife drove him to the airport in Little Rock, and met him there on his return. The airport was 45 miles from Mr. Palmer's home and 33 miles from the Pine Bluff Arsenal.

The Comptroller of the Army is uncertain of the propriety of Mr. Palmer's claim in that there is an airfield in Pine Bluff, Arkansas, which is only 13 miles away from the Arsenal. The Army has interpreted our prior decisions as limiting round-trip POV travel to terminals which are close to the duty station, and which are serviced by local common carriers.

The Finance and Accounting Officer of the Pine Bluff Arsenal has determined that it is not cost effective to utilize the Pine Bluff air terminal due to limited flight availability. At the time of Mr. Palmer's travel, there was one daily flight available to Memphis, Tennessee, and one daily flight available to Little Rock. As for alternate ways to get to Little Rock, including all related costs the travel expenses would be: on commercial bus, $84.70 round trip; military taxi or sedan $79.68; and commercial taxi $103.50. The cost of two round trips by private vehicle from Mr. Palmer's residence to the Little Rock airport was $40.50. Clearly, POV travel, in this case, is advantageous to the Government.

Both the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), and Volume 2 of the Joint Travel Regulations (2 JTR), permit reimbursement of mileage when a POV is used for travel to and from a terminal. Paragraph C4657 of 2 JTR, as it was stated at the time of Mr. Palmer's travel, provided:

1. *General.* When a privately owned automobile is used in lieu of a taxicab incident to the travel of an employee to or from a terminal, payment on a mileage basis is authorized at the rate of $.225 per mile * * *

2. *Reimbursement on a mileage basis.* Mileage for the use of a privately owned automobile will be payable to an employee for the distance the vehicle is actually driven incident to delivering the employee to or returning the employee from a terminal from which he departed and/or to which he returned from temporary duty * * * provided that the total payment does not exceed the cost of the related one way cab fares between the points involved. (Change 183, January 1, 1981.)

This paragraph is in accord with FTR para. 1-4.2(c)(1). Both provisions speak in terms of round-trip reimbursement, with no stated requirement that the terminal be a local terminal. These provisions standing alone would appear to authorize reimbursement for the round trips which were incident to the delivery and return of Mr. Palmer. B-146088, June 27, 1961. The only limitation imposed upon reimbursement is that it may not exceed one-way taxi fare. The fare to Little Rock would be $51.75, and Mr. Palmer's claim was for $40.50.

The Army paid half of the claim upon the theory that the trip to Little Rock was a "leg of the journey" en route to Rock Island. The decision was based on B-177562, May 21, 1973. That case concerned a civilian employee of Fort Hood who drove 124 miles round trip to the Austin, Texas, air terminal en route to Washington, D.C., for temporary duty. In sustaining the claim it was stated that:

* * * it does not appear that the Austin airport would be considered a terminal serving Fort Hood since there are common carrier terminals much nearer to that installation. In the circumstances travel from Fort Hood to Austin would be considered one leg of the authorized travel rather than travel to a terminal. We do not view the regulations concerning travel to terminals as applicable to travel between the point of origin and a distant terminal which serves an area other than the point of origin.

Several of our cases have attempted to define "local terminal." See 47 Comp. Gen. 469 (1968); 45 *id.* 840 (1966); 44 *id.* 445 (1965); 41 *id.* 588 (1962); 40 *id.* 7 (1960). These cases are instructive, but not controlling, as they do not address the provision at issue here. A

primary consideration in those cases was the presence or absence of local common carriers servicing the air terminal. The record here shows that, although there is commercial bus service between Pine Bluff and Little Rock, the local Transportation Officer has found it neither convenient nor cost effective to use such service. In *Earl Cleland,* B-201281, July 7, 1981, we upheld an agency in requiring the use of convenient commercial bus service, where the employee's home was 200 miles from the air terminal used.

In clarifying our position, it must first be noted that the local terminal limitation is not part of the regulations. The limitation is implied rather than expressed. The policy behind the limitation is the prevention of unnecessary use of distant terminals. An employee may have personal reasons for wishing to drive to a terminal in another area. Further, it was wasteful to ignore readily available service at a closer terminal, or to fail to use other convenient and serviceable common carrier service for a leg of a trip.

In the present case, no service was available to Rock Island, Illinois, from the Pine Bluff air terminal. It was necessary for Mr. Palmer to travel to Little Rock, which had the closest servicable air terminal. Our prior decision, B-177562, May 21, 1973, concerning travel from Fort Hood to Austin, is distinguishable in that other closer, servicable terminals were apparently available. Therefore, the rule to be applied is that round-trip POV travel will be reimbursed only when the local or nearest servicable terminal is utilized. The reimbursement is limited to the cost of one-way taxi fare to the authorized terminal. The rule does not limit the use of local common carrier terminals. The Government is not required to utilize the closest common carrier terminal of several that may be available in the same metropolitan area. However, nonlocal terminals utilized must be the nearest serviceable terminal to warrant reimbursement. If the nearest servicable terminal is so distant that another mode of transportation would clearly be more advantageous to the Government, the travel orders should prohibit reimbursement of round-trip POV travel to the distant terminal.

Accordingly, since Little Rock was the nearest servicable air terminal to Pine Bluff Arsenal, and Mr. Palmer's claim was less than the corresponding one-way taxi fare, the claim may be paid.

[B-207350]

Leases—Negotiation—Historic Building Preference—Conditions for Application—Omitted in Solicitation—Cost Consideration

Solicitation for lease of office space stating that preference will be given to space in historic buildings is deficient when it does not indicate how preference will be applied. However, protester cannot reasonably assume that preference is absolute and that an offer of historic space will be accepted over offer of non-historic space, regardless of price.

General Services Administration—Services for Other Agencies, etc.—Space Assignment—Including Leasing—Public Buildings Cooperative Use Act—Historic Building Preference

When applicable statute states that General Services Administration should acquire space in historic buildings when "feasible and prudent" compared with available alternatives, agency has not abused its discretion or violated statute in making award to firm offering non-historic space at substantially lower price.

Contracts—Negotiation—Offers or Proposals—Evaluation—Factors Not in Solicitation—Oral Disclosure During Negotiations

When offeror is orally informed of an agency's requirement during negotiation, notwithstanding its absence in solicitation, offeror is on notice of the requirement and General Accounting Office will deny protest based on failure to state it in the solicitation.

Contracts—Offer and Acceptance—Acceptance—What Constitutes Acceptance—Space Leasing—Inspection, etc. Not Acceptance

Inspection of offered space and/or request for alternate offer does not constitute an acceptance or implied lease by the Government. Acceptance of an offer must be clear and unconditioned.

Matter of: Southland Associates, November 17, 1982:

Southland Associates protests an award to First Federal Savings and Loan Association of Durham, North Carolina, for lease of office space to be occupied by the Internal Revenue Service. Southland alleges that the General Services Administration failed to give a required preference to its proposed site, which was listed in the National Register of Historic Places. We dismiss the protest in part and deny the remainder.

The GSA issued the solicitation, No. RNC81067, on August 14, 1981, requesting a minimum of 4,400 and a maximum of 4,532 square feet of modern, air conditioned office space and one outside parking space in the central business district of Durham. On December 4, GSA amended the solicitation to state that "preference will be given to offers of space in buildings listed in the National Register of Historic Places * * *." Southland submitted an offer of $7.45 per square foot per year for space on the basement level of the Kress Building, a Durham landmark listed in the National Register.

After inspecting the space, the IRS, which at that time was housed in the First Federal Building, advised GSA that it objected to moving to the Kress Building due to high relocation costs and access problems the space would cause for the physically handicapped. In addition, the IRS objected to the basement location because of the lack of windows, which it argued would adversely affect morale and worker productivity. The IRS stated that if GSA insisted on relocating it, above-grade space in the Kress Building

with adequate access should be considered. GSA concluded the basement space did not meet the minimum needs of the Government.

Southland was orally advised of GSA's determination and was requested to submit an offer for above-grade space. On March 12, 1982, Southland submitted an alternative offer of $9.70 per square foot for second floor space in the Kress Building. First Federal, however, offered a succeeding lease of $8.14 per square foot, with one parking space at $150, for an effective rate of $8.17 per square foot per year. The contracting officer consequently sought and obtained permission to waive the historic building preference, since the Government would save $23,728 over 5 years by entering into a succeeding lease with First Federal.

Grounds of Protest:

Southland alleges that GSA failed to apply the stated preference for space in an historic building and that such action was an abuse of GSA's discretion, violating applicable law and regulations. Southland also argues the solicitation did not clearly state that basement space would not meet the Government's requirements. Finally, Southland argues that the basement space offered was fully accessible, that windows are not vital to the mission of IRS, and that its offer of basement space at $7.45 a square foot was the most advantageous to the Government.

GSA's Leasing Policies:

The contracting officer's determination to continue to lease space in the First Federal Building was based on an internal memorandum in which GSA's Public Buildings Service attempted to reconcile seemingly inconsistent policies favoring (1) historic buildings and (2) succeeding leases, Section 102(a) of the Public Buildings Cooperative Use Act of 1976, 40 U.S.C. § 601a (1976), provides that GSA shall acquire and utilize space in buildings of historic significance unless use of such space would not prove "feasible and prudent" compared with available alternatives. The GSA handbook, "Requisition of Leasehold Interest in Real Property," June 22, 1981, also requires an historic site preference unless leasing space in such a building represents poor business judgment. However, GSA's policy on succeeding leases, established by memorandum of February 9, 1981, favors retaining agencies' locations when leases expire if their needs have not changed and if the rental rate is competitive with the local market.

Considering these two policies, the Commissioner of the Public Buildings Service, by memoradum of February 1, 1982, directed that a succeeding lease should be preferrred over an historic site offer unless acceptable space could be obtained in an historic building at a price more advantageous than that of an existing lessor. Relying on this memorandum, the contracting officer rejected

Southland's offer for second floor space, even through the Kress Building was an historic site.

GAO Analysis:

We believe GSA's amended solicitation was deficient in that it did not state how the historic building preference would be applied. We do not, however, believe that it was reasonable for Southland to assume that this was an absolute preference, and that an offer of space in the Kress Building would be accepted over any offer of space in a non-historic building, regardless of price. To the extent that it did so, it risked rejection of its offer.

The statute on which the preference is based requires acquisition of space in historic buildings to be feasible and prudent, compared with available alternatives. In view of the fact that Southland's offer of second floor space was $1.53 a square foot higher than that of First Federal—without considering relocation costs—we do not find that GSA abused its discretion or violated the statute in determining that it was neither feasible nor prudent to accept the offer of space in the Kress building.

For the future, however, we are recommending that GSA clearly indicate in its solicitations how the historic building preference will be applied, specifically referencing the Public Buildings Service memorandum interpreting the Cooperative Use Act to mean that space in an historic building should not be acquired when its price is greater than that of nonhistoric space. In addition, if relocation costs are to be considered in comparing an historic building with a succeeding lease, GSA should include an evaluation factor for these costs in its solicitations.

GSA concedes that the protested solicitation did not clearly state that basement space would not meet the Government's needs, and agrees that this requirement should have been reflected in an amendment. However, we consistently have held that when an offeror is informed of an agency's requirement during negotiations, notwithstanding its absence in a solicitation, the offeror is on notice of the requirement. Washington School of Psychiatry, B-192756, March 14, 1979, 79-1 CPD 178; *ADP Network Services, Inc.*, B-193817, March 7, 1979, 79-1 CPD 163. Southland was in fact informed of IRS's need for above-grade space during the negotiation period and was allowed to submit an alternative offer. We therefore cannot find the award improper on this basis.

Southland states that because GSA and IRS inspected the proposed site, and because it was requested to submit prices for space on the second floor of the Kress Building, it understood that its offer would be accepted by GSA and acted to its detriment upon this understanding. GSA's actions, however, did not constitute an acceptance or create an implied contract between Southland and GSA. The acceptance of a contractor's offer by the Government

must be clear and unconditioned. *Laurence Hall d/b/a/ Halcyon Days,* B-189697, February 1, 1978, 78-1 CPD 91.

Southland further argues that its offer of $7.45 a square foot for space in the basement of the Kress Building should have been accepted because it was the lowest submitted by a responsible offeror. However, since this was an offer to provide something other than what the Government required, the fact that Southland's price was lower than First Federal's is irrelevant. See *Q.S. Incorporated,* B-203503, May 4, 1982, 82-1 CPD 417.

Finally, Southland's challenge to IRS's requirements for windows and handicapped access is, in our opinion, untimely. We consider GSA's oral advice to Southland that the basement space was unacceptable to be the equivalent of an amendment to the solicitation. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1982), require protests regarding amendments to be filed before the next closing date for receipt of proposals. By analogy, Southland's protest should have been filed not later than the due date for its offer of second floor space. Since Southland did not challenge the requirements by that time, we dismiss this basis of protest.

The remainder of the protest is denied.

[B-200923]

Courts—Judges—Compensation—Increases—Comparability Pay Adjustment—Precluded Under Pub. L. 97-92

Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in Oct. 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since sec. 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on Oct. 1, 1982, in the absence of specific congressional authorization.

Matter of: Federal Judges—Applicability of October 1982 Pay Increase, November 23, 1982:

ISSUE

The issue presented is whether section 140 of Public Law 97-92 (28 U.S. Code 461 note) precludes a comparability adjustment of 4 percent on the salaries of Federal judges. We hold that since section 140 is permanent legislation and since it precludes pay increases for Federal judges unless specifically authorized by Act of Congress, Federal judges are not entitled to a comparability adjustment of 4 percent effective on October 1, 1982, in the absence of specific congressional authorization.

BACKGROUND

This decision is in response to a request from the Honorable William E. Foley, Director, Administrative Office of the United States Courts. The Administrative Office seeks reconsideration of our

letter of October 1, 1982, B-200923, to the Chairmen of the Senate and House Appropriations Committees in which we interpreted section 140 of Public Law 97-92 as permanent legislation precluding any comparability adjustment to the salaries of Federal judges unless the increases are specifically authorized by the Congress.

Pay Adjustments for Federal Judges

The salaries of Federal judges are subject to adjustments by two mechanisms. First, the Federal Salary Act of 1967, Public Law 90-206, Title II, 81 Stat. 624, provides for a quadrennial review of executive, legislative, and judicial salaries. See 2 U.S.C. §§ 351-361 (1976). Second, the Executive Salary Cost-of-Living Adjustment Act, Public Law 94-82, Title II, 89 Stat. 419 (1975), provides that salaries covered by the Federal Salary Act of 1967 will receive the same comparability adjustment on October 1 of each year as is made to the General Schedule under the provisions of 5 U.S.C. § 5305. See 5 U.S.C. § 5318 and 28 U.S.C. § 461.

Since 1976 the Congress has imposed a series of "caps" on executive, legislative, and judicial branch salaries by limiting the use of appropriated funds to pay the salaries of high-level executive, legislative, and judicial branch officials to the rate payable on September 30 of that year. However, with respect to Federal judges covered by Article III of the Constitution, certain of these pay caps have been held to have "diminished" their compensation which, by operation of Public Law 94-82, automatically increased each October 1 by the amount of comparability adjustment granted to the General Schedule. In *United States* v. *Will et al.*, 449 U.S. 200 (1980), the Supreme Court held that pay caps enacted on or after October 1 violated the compensation clause of Article III of the Constitution by purportedly repealing a pay increase that had already taken effect.

Thus, the Supreme Court overturned the pay caps enacted in 1976 and 1979 as to Federal judges, and, pursuant to the *Will* decision, the salaries of Federal judges were also increased in 1980 and 1981 for the same reason.

Section 140

Subsequent to the October 1981 pay increase, the Congress enacted Public Law 97-92, December 15, 1981, 95 Stat. 1183, a continuing appropriations act which provides in section 140 as follows:

> Sec. 140. Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided,* That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or any Justice of the Supreme Court.

Since the pay cap for 1982 is contained in Public Law 97-276, § 101(e), October 2, 1982, a measure enacted after October 1, Federal judges would receive the comparability adjustment of 4 percent pursuant to the *Will* decision except for the operation of section 140, quoted above. There has been no specific authorization by Congress of a pay increase for Federal judges this year.

Arguments of Administrative Office

The Administrative Office urges that we modify our interpretation of section 140 and rule that Federal judges are entitled to a 4 percent increase effective October 1, 1982. The Administrative Office argues that, in view of the presumption against permanent legislation contained in appropriations measures, the presumption against implied repeals of preexisting statutes, and the weight of the statutory cost-of-living adjustment mechanism contained in Public Law 94-82, Federal judges are entitled to this recent pay increase.

DISCUSSION

As we stated in our opinion letter of October 1, 1982, we have held that a provision contained in an annual appropriations act may not be construed to be permanent legislation unless the language or the nature of the provision makes it clear that such was the intent of the Congress. Usually when the word "hereafter" or other words indicating futurity are used, or when the provision is of a general character bearing no relation to the object of the appropriation, the provision may be construed to be permanent legislation. 36 Comp. Gen. 434, 436 (1956); 32 *id.* 11 (1952); 26 *id.* 354, 357 (1946); and 10 *id.* 120 (1930). Section 140 of Public Law 97-92, quoted above, contains such words of futurity, and the provision bears no direct relation to the object of the appropriations act in which it appeared, a continuing appropriations act for fiscal year 1982. Thus, we conclude that section 140 is permanent legislation.

The only legislative history we have discovered on this provision supports that interpretation. The provision was introduced for the stated purpose of precluding pay increases for Federal judges unless they are specifically authorized by Congress. Cong. Rec. S13373 (November 13, 1981) (statement of Sen. Dole).

Furthermore, an interpretation that section 140 is not permanent legislation would strip the section of any legal effect. Section 140 was included in a continuing resolution which was enacted on December 15, 1981, and which expired on September 30, 1982. The next applicable cost-of-living pay increase under existing law for Federal judges would be effective October 1, 1982, after the expiration of the continuing resolution. Thus, if section 140 were not held to be permanent legislation, the section would have no legal effect since it would have been enacted to prevent increases during a

period when no increases were authorized to be made. There exists a presumption against interpreting a statute in a way which renders it ineffective. *Federal Trade Commission* v. *Manager, Retail Credit Co.,* 515 F.2d 988, 994 (D.C. Cir. 1975).

In that regard, we are unable to agree with the view of the Administrative Office of the United States Courts that the inclusion of section 141 in House Resolution 370, which raised certain executive salaries, is sufficiently correlated to section 140 of that resolution so as to permit an interpretation different than expressed in this decision. Section 141 dealt exclusively with salaries of persons whose pay corresponds with the rate of basic pay for levels III, IV, and V of the Executive Schedule; we do not believe that Members of Congress voting on the continuing resolution needed any reassurance that section 141 did not also deal with salaries of Federal judges. Nor do we find the fact of the possibility of later enactment of a regular appropriation measure for the judiciary as persuasive in this matter.

As noted by the Administrative Office, our interpretation of section 140 constitutes an implied repeal of that portion of Public Law 94-82 providing annual comparability adjustments to Federal judges, and implied repeals are not favored by the courts, particularly when contained in appropriations acts. See *Will, supra,* and cases cited therein. However, it is well settled that Congress can amend substantive legislation by a provision in an appropriations act. *United States* v. *Dickerson,* 310 U.S. 554 (1940); *City of Los Angeles* v. *Adams,* 556 F.2d 40 (D.C. Cir. 1977); *Skoko* v. *Andrus,* 638 F.2d 1154 (9th Cir. 1979); *Bickford* v. *United States,* 656 F.2d 636 (Ct. Cl. 1981).

The Administrative Office has cited numerous cases in which the courts have overturned appropriations measures which would essentially override or repeal substantive legislation. *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978); *Environmental Defense Fund, Inc.* v. *Froehlke,* 473 F.2d 346, 353-354 (8th Cir. 1972); *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F.2d 1164 (6th Cir. 1972). However, in each of these cases the courts addressed whether continuing appropriations for certain public works projects constituted a congressional decision to complete the projects despite the provisions of various environmental statutes. For example, in *TVA* v. *Hill,* the Supreme Court rules that expressions of the appropriations committees in committee reports could not be equated with statutes enacted by Congress, and a mere lump-sum appropriation providing continued funding for the project would not override the protection of the Endangered Species Act. 437 U.S. 153, 190-191.

The provision in question in this case, section 140 of Public Law 97-92, is specific in nature and by its express terms serves to bar future pay increases for Federal judges except as specifically authorized by Congress. We do not find that section 140 is similar or

analogous to appropriations measures which the courts have overruled in prior cases.

Finally, we note that our interpretation of section 140 has been adopted by the Executive Branch in publishing the pay schedules effective on or after October 1, 1982. Exec. Order No. 12387, October 8, 1982, 47 Fed. Reg. 44981, October 13, 1982.

Accordingly, we conclude that section 140 of Public Law 97-92 bars implementation of any pay increase for Federal judges as of October 1, 1982, in the absence of a specific authorization by Congress.

[B-205348]

Compensation—Overtime—Fair Labor Standards Act—Early Reporting and/or Delayed Departure—Lunch Period, etc. Setoff—*Bona Fide* Break Requirement

The Office of Personnel Management (OPM) has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no *bona fide* lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. 201 et seq., for hours worked in excess of 40 in a week as no offset for lunch breaks may be made.

Matter of: John L. Svercek, *et al.*—Bona Fide Meal Periods Under Fair Labor Standards Act, November 23, 1982:

Mr. Don E. Hansen, Chief, Fiscal Standards Branch, Financial Systems Division, Office of Accounting, Federal Aviation Administration (FAA), has requested our decision as to whether six FAA Air Traffic Control Specialists may be paid overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1976). For the reasons which follow we hold that the employees may be compensated for overtime work under FLSA insofar as their claims are not barred by 31 U.S.C. § 71a (1976).

BACKGROUND

Mr. Hansen has forwarded the claims of Messrs. John L. Svercek, George C. Spencer, Stanley G. Johnston, Joseph G. Keller, Wallace E. Hamel and Arthur W. DeAlfi for overtime compensation for attending pre-duty briefings prior to the beginning of their scheduled shifts at FAA's Binghamton, New York, facility. These claims had been investigated by the Office of Personnel Management's (OPM) New York Regional Office. Under 29 U.S.C. § 204(f) (1976), the Civil Service Commission, now OPM, is authorized to administer FLSA with respect to individuals employed by FAA.

After an investigation into the employee's claims, OPM's New York Regional Office issued compliance orders to the FAA finding

that the pre-duty briefings were compensable work periods under FLSA and requesting that FAA pay overtime compensation for such work were appropriate. The FAA now forwards a rebuttal of OPM's compliance orders and has asked us to review the matter.

The New York Regional Office of OPM found that during the period May 1, 1974 to July 1, 1976, FAA policy, as expressed in FAA Facility Operations Handbook 7230.1c, required that air traffic controllers report for a pre-duty briefing prior to the beginning of their scheduled shift. The FAA did not prescribe the length of the briefings but the briefings varied in length from 5 to 20 minutes. The employees here did not report to or depart from the facility at the same time, and they were permitted to depart prior to the scheduled end of the shift if they were properly relieved.

The OPM then found that an average of 15 minutes for the pre-shift briefings was a reasonable claim and that the time in these pre-shift briefings meets the FLSA definition of "work" that is suffered or permitted and which should have been compensated under the provisions of 29 U.S.C. § 207(a)(1).

In reaching its decision, OPM's New York Regional Office considered FAA's contention that time spent on lunch breaks should have been used to offset the compensable pre-shift work. The FAA submitted a memorandum from the current Chief of the Binghamton Tower stating that for the period September 1975, through July 1976, "[i]t was standard practice that all employees received approximately 30 minutes for lunch break." The FAA further contended that all of the employees spent their lunch breaks away from the work site in a cafeteria which was physically located in the same building but on a different floor and that, although the employees were on call while at lunch in the cafeteria, they were never actually recalled to the post of duty during a lunch break.

In response to the FAA's contentions, the employees asserted that they did not routinely have a lunch break because of staffing shortages during the day shift, which meant that there were not enough Controllers to relieve those on each position and that the nonsupervisory Controller often acted as Controller-in-Charge, and because the midnight shift was staffed by only one employee.

After reviewing the facts, the New York Regional Office of OPM found that the FAA had not adequately supported its contention that the employees were given and in fact took a *bona fide* meal period. The compliance order states that:

> * * * Under the FLSA for a bona fide meal period the employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily thirty minutes or more is long enough for a bona fide meal period, although a shorter period may be long enough under special conditions. An employee is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. However, it is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period. In this case, we note that the official policy of the FAA is that Air Traffic Controllers work a straight

eight hour tour of duty with no time off for a duty-free meal period. Although the employees may be relieved from their work positions, they are subject [to] callback. When contacted by this office, the Chief of the Binghamton Tower stated that his policy was to discourage the employees from eating at the work station, that this policy was never formally promulgated in writing, that he took no special measures to enforce it, that the length of the meal period was never definitely established but was approximately thirty minutes on the average but was sometimes more and sometimes less, that the employees remained subject to recall although this happened infrequently, that the Facility was short staffed during the period in question after his arrival in September of 1975, and that he could not speak to the policy in effect for the rest of the period (May, 1974, to September, 1975). *Since the meal period did not have a fixed length and since the employees remained subject to recall, the employees were not completely relieved from duty and the time does not constitute a bona fide meal period under the FLSA.* [Italic supplied.]

In challenging OPM's analysis, the FAA relies on the statement from the Chief of the Binghampton Tower that "[i]t was standard practice that all employees received approximately 30 minutes for lunch break." The Chief also stated that his policy was to discourage employees from eating at the work station and that although the employees did remain subject to recall during the meal periods, they were actually recalled quite infrequently. FAA also takes issue with the principle enumerated in the above-quoted compliance order which we have underscored. Rather, FAA relies on our decision *Raymond A. Allen, et al.,* B-188687, September 21, 1977, (modified at *Raymond A. Allen, et al.,* B-188687, May 10, 1978), in which we held that where an agency can establish that an employee was afforded a lunch break away from his post, the mere fact that the employee was on call and not permitted to leave the building or premises will not defeat a setoff for the lunch breaks unless the employee demonstrates that the break was substantially reduced by responding to calls. The FAA states:

It was our agency's position that the line of reasoning demonstrated in this CG decision whereby breaktime must be substantially reduced by actually responding to calls, was applicable in these cases. This differs significantly from the line of reasoning demonstrated by OPM in their compliance orders where they state that the employees were not completely relieved from duty since they remained subject to recall.

The FAA notes that *Raymond A. Allen,* above, involved employees claiming overtime under 5 U.S.C. § 5542 and not FLSA. Since, however, FAA was unaware of any decision under FLSA addressing the concept of offsetting compensable pre-shift overtime work by meal breaktime, FAA concluded that the above title 5 concept was applicable here.

OPM'S COMMENTS

In view of OPM's responsibility to administer FLSA we requested a report on the compliance order and FAA's question on the validity of the order from OPM's General Counsel. We were particularly interested in the General Counsel's views on the validity of the compliance order's statement that since the meal period did not have a fixed length, and since the employees remain subject to recall, the employees were not completely relieved from duty, and

that time does not constitute a *bona fide* meal period under the FLSA.

The General Counsel reported that the above statement incompletely recapitulated the discussion preceding it as it did not reflect the finding that the employees did not routinely have a lunch break because of staffing shortages. He states that when the employees had no lunch break, they of course, were not recalled, thus partially explaining the infrequency of recalls to duty. He explained further that:

> * * * in addition to the absence of certainty with respect to whether there would be a lunch break, there was no certainty of when it could be taken, or for how long. The perception of the employees that the lunch time was uncertain and not to be regarded as free time was reinforced by the fact that they are scheduled to work a straight eight-hour tour of duty with no time off for a duty-free meal period. This fact, along with the lack of definiteness as to the establishment or promulgation of the meal period policy, suggests that neither the agency nor the employees regarded the lunch break as bona fide; it was not recognized in the scheduling of work; nor in any agency writing.
>
> * * * [Moreover] there were additional facts which support the findings but which are not reflected in the report.* * * the "lunch breaks,"—on the sporadic and infrequent occasions that they were taken—were not gererally taken at the "cafeteria [in reality the airport coffee shop] located away from the work-site." There was rarely opportunity for doing so. Rather, the meals, when not taken at the work-site itself, were taken in the "ready room" (also called the "hot plate" or "radar range" room), right near the work-site, so that the employee could resume his duties at a moment's notice.* * * the "lunch periods," so called, were so subject to desultory interruption that they did not even amount to "rest periods," which FAA recognizes to be "work time."
>
> The agency "policy" of discouraging the eating of meals at the work-site was not enforced by those who made the policy, simply because it was rare that there was anyone to relieve the employee so that he could go any appreciable distance from the work-site.
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> * * * * * * *
>
> There was no suggestion or pretense that the "lunch break" was "free time," and the characterization of it as such, * * * was "very much an afterthought on the part of FAA." * * * as a result of a compliance order dated July 11, 1980, the agency paid, under identical circumstances, overtime compensation to another employee, [omitted], and raised no question whatever about free meal periods.

In view of the above recitation of the facts, it seems clear that OPM did not reach its decision that the lunch periods were work solely because the breaks did not have a fixed length and because the employees were subject to recall. Rather the cumulative evidence that no lunch breaks in fact existed and the employees actually worked through their "breaks" stimulated OPM's decision.

FAA'S POSITION

The FAA does not appear to object to the finding that the pre-duty briefings were compensable hours of work under FLSA but rather FAA contends that the employees did regularly take meal periods which should offset the pre-duty work time performed by the employees. The question, therefore, is whether the employees did in fact have *bona fide* lunch breaks which are not compensable hours of work and which would serve to offset the work done in the pre-duty briefings.

OPINION

We note initially that Federal agencies must compute an employee's overtime benefits under both FLSA and Title 5 of the United States Code and the employee is to be paid according to the computation most beneficial to the employee. 54 Comp. Gen. 371 (1974). Title 5 concepts do not govern the method of computing entitlements under FLSA. *Paul G. Abendroth, et al.,* 60 Comp. Gen. 90 (1980). Therefore, to the extent that our decision *Raymond A. Allen* prescribes rules of entitlement to overtime compensation under Title 5, such rules are not to be applied to questions of entitlement to overtime compensation under FLSA.

The courts have held that under FLSA, the essential consideration as to whether a meal period is *bona fide* is whether the employees are in fact completely relieved from work for the purpose of eating regularly scheduled meals[1] and whether the mealtime is free and uninterrupted.[2]

We have held that we will not disturb OPM's findings of fact on FLSA claims unless clearly erroneous and the burden of proof lies with the party challenging the findings. *Paul Spurr,* 60 Comp. Gen. 354 (1981). Considering OPM's further explanation of the facts in this case, that the employees either could not leave their work sites for lunch or that they were frequently interrupted if they did leave their work sites, we accept OPM's finding that the employees did not have *bona fide* lunch breaks and were therefore performing compensable work during their supposed lunch breaks.

Since these employees did not have *bona fide* meal periods which would allow an offset, we agree with OPM that these employees are entitled to overtime compensation under FLSA for hours worked in excess of 40 in a week when the employees were engaged in pre-shift briefings.

We note, however, that these claims are partially barred by the Barring Act, 31 U.S.C. § 71a (now § 3702), which precludes our Office from considering a claim not received here within 6 years after the date such claim first accrued. 57 Comp. Gen. 441 (1978). Mr. Svercek's claim was first received in this Office on October 1, 1981, the claims of Messrs. Spencer, Keller, Hamel and DeAlfi were received on August 27, 1981, and Mr. Johnston's claim was received on October 21, 1980. Accordingly, payments may be made to the above claimants as to the portion of their claims not barred by 31 U.S.C. § 71a.

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[1] *Blain* v. *General Electric Co.,* 371 F. Supp. 857 (W. D. Ky. 1971)
[2] *Fox* v. *Summit King Mines, Ltd.* 143 F. 2d 926 (9th Cir. 1944)

[B-207527]

Subsistence—Per Diem—"Lodgings-Plus" Basis—Computation—Average Cost of Lodgings—Annual Leave Effect

An employee rented a house for a month while on temporary duty, rather than obtaining lodgings on a daily basis. He went on annual leave for 1 day during the period but continued to occupy the rented lodgings that night. The employee's average cost of lodging for the purpose of per diem computation on a lodgings-plus basis is to be determined by prorating the total rental cost over the 30 days of temporary duty, excluding the day of annual leave, if the agency determines the employee acted prudently in obtaining the lodgings for a month and the cost to the Government does not exceed the cost of suitable lodging at a daily rate.

Matter of: Jesus Soto, Jr.—Per Diem—Computation of Average Cost of Lodgings—Annual Leave, November 29, 1982:

This decision is in response to a request from Ms. Betty Gillham, an authorized certifying officer of the Bonneville Power Administration (BPA), Department of Energy, for advice as to the proper method of determining the average cost of lodging when computing per diem by the lodgings-plus method when an employee goes on annual leave at a temporary duty site.

Jesus Soto, Jr., an employee of BPA in Vancouver, Washington, was assigned to temporary duty in Madras, Oregon, for the month of March 1982. He rented a house for the month at a cost the BPA has informed us did not exceed the cost of renting a suitable motel or hotel at a daily rate. Mr. Soto took 1 day of annual leave "in the field" during this period and the BPA stated it appeared he stayed that evening in the house he had rented. In computing Mr. Soto's average cost of lodging, the BPA prorated the rental cost over 31 days instead of the 30 days used by Mr. Soto. He was therefore reimbursed an amount equal to 30 days of per diem at $42 per day, rather than 30 days at $43, to which he claims entitlement. The BPA has asked if the method of computation used was correct or whether to omit from the computation of average lodging cost the night when Mr. Soto was in an annual leave status at the temporary duty site and was not in a per diem status.

The BPA prorated the rental cost over 31 days, including the day of annual leave, because Mr. Soto occupied the house on that evening. The BPA determined that Mr. Soto's occupancy of the house mandated the inclusion of that day in the computations based on our decision in *James K. Gibbs,* 57 Comp. Gen. 821 (1978). In that decision we held that where an employee on temporary duty rents lodgings by the week or month rather than by the day, but occupies the accommodations for a lesser period because he voluntarily returns home on weekends, the average cost of lodging may be derived by prorating the rental cost over the number of nights the accommodations are actually occupied. This decision reversed prior decisions where we held that in the weekend return situation, the

average cost of lodging had to be derived by dividing the rental cost by the entire number of days in the rental period.

In addition to the *James K. Gibbs* decision, we have permitted the proration of the monthly or weekly rental cost over the nights of actual occupancy rather than the entire rental period where the employee acted reasonably or prudently in renting lodging by the month. In one case we used the lesser number where the employee knew he would be on temporary assignment for less than the rental period (22 days), but the monthly rental was less than the amount the employee would have been required to pay based on the daily rental rate. *Willard R. Gillette,* B-183341, May 13, 1975.

We do not believe that Mr. Soto's occupancy of his rented lodging on the day he was in a non-per diem status requires inclusion of that day in the computation of his average cost of lodging. Paragraph 1-7.3c(1)(a) of the Federal Travel Regulations, FPMR 101-7 (May 1973), provides that in determining the average cost of lodging an agency should "divide the total amount paid for lodgings during the period covered by the voucher by the number of nights for which lodgings were or would have been required while away from the official station."

We believe that inherent in the phrase "for which lodgings were or would have been required" is the concept that the lodgings are required in connection with the temporary duty. Therefore, since Mr. Soto did not perform official business on the day he was on annual leave, his lodgings for that night were not incident to his temporary duty.

Therefore, we conclude that where an employee, such as Mr. Soto, is on annual leave during a temporary duty assignment that day (or days) of annual leave is not to be included in the computation of the average cost of lodging. As in *James K. Gibbs*, and *Willard R. Gillette,* however, we feel this method of computation should be contingent upon a determination that (1) the employee acted prudently in obtaining lodgings for a longer period than a day, and (2) the cost to the Government does not exceed that which would have been incurred had the employee obtained suitable lodgings at the daily rate.

[B-206999.6]

Bids—Estimates of Government—Faulty—Cancellation of Invitation—Incumbent Contractor's Advantage—Unfairness Possibility

An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the incumbent contractor, one of which an audit has called into question, and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage.

Matter of: Downtown Copy Center, December 6, 1982:

Downtown Copy Center (DCC) protests the cancellation of solicitation No. IFB-82-03 by the Federal Communications Commission (FCC). The solicitation sought a contractor to supply services, including personnel and equipment, for the search, duplication, and sale to the general public of certain documents maintained by the FCC. The contractor was also to furnish coin-operated copiers for use by the public.[1]

DCC has also filed suit against the FCC in the United States Claims Court, seeking injunctive and declaratory relief.[2] *Downtown Copy Center* v. *The United States,* Civil Action No. 527-82C. By order dated October 29, 1982, the court requested an advisory opinion from our Office. This decision is in response to that request.

The central issue of the case is whether the existence of inaccuracies in the solicitation's volume estimates provided a reasonable basis for cancellation of the solicitation after bid opening. As discussed below, we conclude that the cancellation was justified. We therefore deny the protest.

The FCC issued the solicitation on February 18, 1982. Section C of the solicitation contained a bidding schedule for services for the initial year of the contract and two 1-year options. The schedule listed 13 categories of services, such as duplication services and search services, and provided an estimate of the yearly volume of work projected for each category. A footnote to the schedule cautioned that estimated volumes were not to be construed as actual requirements.

The solicitation specified that award would be made on the basis of the lowest bid as determined by multiplying the unit prices bid for each item by the estimated quantities specified and then adding the totals for each of the 3 years. The contractor would retain the revenue generated from sales under the contract. DCC was the in-

[1] This contract apparently falls within section 11 of the Federal Advisory Committee Act, 5 U.S.C. Appendix (1976). While we have held that the act does not require the application of any particular procurement procedures, *CSA Reporting Corporation,* 59 Comp. Gen. 338 (1980), 80-1 CPD 225, this procurement was conducted under the Federal Procurement Regulations.

[2] The Federal Courts Improvement Act of 1982, Pub. L. 97-164, which became effective October 1, 1982 (28 U.S.C. 1 note), established the United States Claims Court and the United States Court of Appeals for the Federal Circuit, replacing the United States Court of Claims and the United States Court of Customs and Patent Appeals. Under the Act, the United States Claims Court has jurisdiction "[t]o afford complete relief on any contract claim brought before the contract is awarded • • •." 96 Stat. 39, § 133(a), April 2, 1982, 28 U.S.C. 1491(a).

cumbent contractor and had held the contract, through option exercises and extensions, for the previous 7 years.

At a pre-bid conference on March 4, prospective bidders requested copies of DCC's quarterly reports, which were the source of some of the solicitation's volume estimates. On that same day, the FCC issued an amendment to the solicitation substantially increasing the estimated volumes. The FCC subsequently received additional requests from prospective bidders to make available DCC's quarterly reports. In a letter dated March 18, the FCC responded by stating that it only had on file three quarterly reports for 1981 and one for 1977. The letter set forth figures from those reports for April 1981 to December 1981.

The FCC opened bids on April 16. DCC's low bid of $1,087,777.50 was the lowest of the six received. On April 29, the third low bidder, TS Infosystems Inc. (TSI), filed a protest with this Office contending that the solicitation contained inaccurate volume estimates and that DCC was nonresponsible because of allegedly poor service it was rendering under the current contract.[3] Automated Datatron Incorporated (ADI), the second low bidder at $1,093,291, protested to this Office on April 30, alleging that DCC's bid was mathematically unbalanced.

After bid opening, the FCC requested the Defense Contract Audit Agency (DCAA) to audit DCC's records to determine whether the firm had submitted an unbalanced bid and whether DCC's quarterly reports were accurate.

The DCAA reviewed DCC's records for the last quarter of 1981 and, in a July 2 report, stated that it found no basis to challenge DCC's proposed prices. The DCAA cautioned, however, that its conclusion was based on the assumption that the solicitation's volume estimates were accurate. That assumption, the DCAA explained, might not be realistic for the following reasons:

1. The audit of duplication services for the last quarter of 1981 revealed a disparity of 38 percent between DCC's quarterly report figure of 457,428 copies and DCAA's audit figure of 632,695 copies.

2. The DCAA was unable to verify the volume of copies from coin-operated machines since DCC did not maintain independent meter readings for those machines but relied on meter readings from maintenance records.

3. DCC was unable to provide time records to substantiate the charges for search services. In addition, invoices for those services were not always consistent with respect to the method of billing.

4. DCC did not retain the supporting data that were the bases of its quarterly reports.

On September 8, the FCC canceled the solicitation, stating that "the estimates * * * were probably in error and could have given

[3] We dismissed TSI's protest on procedural grounds. *TS Infosystems, Inc.*, B-206999.3, May 18, 1982, 82-1 CPD 479. On June 11, TSI requested that we reconsider our decision and that request was pending when the FCC canceled the solicitation.

an unfair advantage to the incumbent contractor." TSI and ADI subsequently withdrew their protests. On September 21, DCC filed a protest with the FCC, challenging the cancellation. The FCC denied the protest on September 30. DCC subsequently brought its action before the Claims Court on October 13 and filed this protest on October 15.

The FCC contends that it was reasonable to assume, based on the DCAA report, that the solicitation's volume estimates were inaccurate and that the inaccuracies could have been prejudicial to the other bidders *vis-a-vis* DCC. In this regard, the FCC asserts that the Government had a duty to include in the solicitation the most accurate information available. Since one of DCC's quarterly reports was shown to be inaccurate and the supporting data for the report inconsistent or missing, the FCC continues, it was reasonable to conclude that the volume estimates based on those reports did not represent the most accurate information. The FCC also asserts that since DCC had access to accurate volume estimates, it was reasonable to believe that DCC might have had an unfair advantage, particularly since the difference between the bids of DCC and ADI was only $5,513.50.

DCC challenges the FCC's assertion that the inaccuracies in the volume estimates were sufficient to justify cancellation. First, DCC alleges that the FCC's reliance on the 38 percent disparity in one category of services for one quarter of the year was improper. In this regard, DCC offers the affidavit of Dr. Charles R. Mann, a statistical analyst who reviewed DCC's duplication services records for all of 1981. Dr. Mann states that his review of the records indicates that, while the DCAA's figures for the last quarter of 1981 were essentially correct, DCC's volume of duplication services for that entire year was 2,309,362 copies, or only 17.73 percent more than the estimate of 1,900,000 copies that the solicitation projected for the first year of the contract.

DCC also asserts that inaccuracies in the solicitation's overall volume estimates were minimal. DCC states that Dr. Mann examined DCC's records for the volume of coin-operated copying in 1981 and found that the solicitation underestimated that volume by only 106,533 copies, or approximately 7 percent. Since the FCC did not allege that any of the remaining solicitation estimates were inaccurate, DCC believes that it can be assumed that they are correct. On this basis, DCC calculates the overall percentage of error in the solicitation's volume estimates at 10.11 percent. Neither 10.11 percent nor 17.73 percent, DCC asserts, represents a substantial error.

DCC also argues that it clearly had no prejudicial "insider's" advantage since the figures in its reports represented the volume of work that the firm believed to be accurate. In addition, DCC asserts that, since the FCC failed to show that DCC would have been displaced as low bidder or that any bidder would have altered its

prices based on different estimates, the FCC has not proved the existence of prejudice here.

The cancellation of an invitation for bids after bid prices have been exposed can have a deleterious effect on the competitive bid system. For that reason, cancellation is improper unless there is a cogent and compelling reason which justifies the cancellation. *Massman Construction Co.* v. *United States,* 60 F. Supp. 635 (Ct. Cl.), *cert. denied* 325 U.S. 866 (1945); Federal Procurement Regulations (FPR) § 1-2.404-1(a). A contracting officer, however, has broad discretion in determining whether a cogent and compelling reason exists, *Marmac Industries, Inc.,* B-203377.5, January 8, 1982, 82-1 CPD 22, and thus a determination to cancel a solicitation after bid opening is not legally objectionable unless there clearly is no reasonable basis for it. *Central Mechanical, Inc.,* B-206030, February 4, 1982, 82-1 CPD 91.

Cancellation obviously is appropriate where the supplies or services sought by the solicitation are no longer needed, *see* FPR § 1-2.404-1(b)(2), or where, because of deficient specifications, award under the solicitation would not satisfy the Government's needs. *Keco Industries, Inc.,* B-191856, April 5, 1979, 79-1 CPD 234. In addition, there are certain situations where, despite the strong public policy against cancellation after bid opening, such cancellation is appropriate in light of other equally important considerations concerning the competitive bid system. For example, under certain circumstances an agency's failure to solicit its incumbent contractor would prevent the full and free competition envisioned by the procurement statutes; cancellation and resolicitation to remedy that problem is appropriate. See *Scott Graphics, Inc.; Photomedia Corp.,* 54 Comp. Gen. 973 (1975), 75-1 CPD 302. Similarly, where estimates in a solicitation are found to be other than a reasonably accurate representation of actual anticipated requirements, cancellation is required to preclude the possibility of an award that would not result in the lowest cost to the Government and to provide bidders an opportunity to structure their bids on a more realistic representation of anticipated needs. *Edward B. Friel, Inc.,* 55 Comp. Gen. 231 (1975), 75-2 CPD 164; *Photo Data, Inc.,* B-188912, July 29, 1977, 77-2 CPD 62. Perhaps even more significantly, cancellation is appropriate whenever it reasonably appears that for some reason fair and equal competition—or competition on an equal basis—might have been thwarted. *Photo Data, Inc., supra;* 49 Comp. Gen. 251 (1969); see also *The Franklin Institute,* 55 Comp. Gen. 280 (1975, 75-2 CPD 194.

In this case, we believe the contracting officer had a reasonable basis for the determination to cancel. Although the DCAA report reflected DCC's records for only one quarter of 1 year and concerned only four of the 13 categories under the solicitation, the report did indicate a 38 percent discrepancy between the volume of duplication reported by DCC during the last quarter of 1981 and

the DCAA's audit figures for that period, and that discrepancy was substantial. In addition, the DCAA found DCC's recordkeeping to be so lacking that the DCAA was unable to verify the incumbent's quarterly estimates for search services and coin-operated copying, the other two categories in which DCC's quarterly reports formed the basis for the solicitation's volume estimates. Those three categories represented the major items of work under the solicitation, as exhibited by the fact that the bid prices for that work constituted between 77 and 80 percent of the total price bid by each of the three lowest bidders. Finally, the FCC, for whatever reason, apparently, did not have on file a complete set of quarterly reports for any one of the 7 years that DCC had been performing the contract. Thus, the FCC had no historical data by which to verify the volume estimates but, practically speaking, had only volume figures from DCC's quarterly reports filed in 1981, a portion of which the DCAA report called into question.

The record does not indicate whether the FCC's lack of data stems from the agency's apparent failure to demand continuous and more complete information from DCC during the contract or from DCC's apparent failure to supply that information. In either case, it resulted in a situation where, we think, the contracting officer could reasonably view the validity of the solicitation estimates as questionable. While the DCAA's conclusion regarding one quarter of 1 year did not automatically warrant a conclusion that a 38 percent discrepancy was likely for the other quarters, neither did it provide the contracting officer with any basis for confidence in the reliability of the other figures reported to the agency by DCC. Moreover, while DCC's statistical expert states that his review showed a 17.73 percent discrepancy for the entire year and not a 38 percent discrepancy, we cannot say that the contracting officer acted unreasonably in relying on the reported 38 percent disparity or that, given the large volume (1.9 million copies) involved, even a 17.73 percent variation is not a significant one.

Moreover, given the small difference between the DCC and ADI bids (approximately $5,500 on bids exceeding $1 million), we think the contracting officer could reasonably believe that DCC could have had an unfair advantage, or at the very least could appear to have had such an advantage, in light of the apparent understated estimates. While DCC argues that no bid would have been different if more accurate estimates had been used, we think it is more reasonable to conclude otherwise and that DCC could have had the benefit of an unfair advantage as a result. This advantage, we think, could have manifested itself in how DCC, as the only bidder in a position to know that significantly more duplicating work and perhaps other work would be required than indicated by the invitation for bids, chose to structure its pricing. Obviously, given the small difference between the two low bids, if DCC chose to bid lower than it otherwise would have on the basis of its superior

knowledge, it might well have been the low bidder solely for that reason. Similarly, if the second low bidder would have bid lower on the basis of more realistic higher estimates, DCC might have been displaced as low bidder. See *Photo Data, Inc., supra.* Although the record doesn't establish that either of these possibilities in fact would have occurred, the importance of protecting the integrity of the competitive bidding system and of preventing even the appearance of an unfair competitive advantage provides sufficient basis for canceling a solicitation in the face of a reasonable possibility that a bidder had an unfair advantage. *See* 49 Comp. Gen. 251, *supra.*

We note DCC's further assertion that it could have gained no undue competitive advantage because it did not know, any more than its competitors did, that the data in its quarterly reports was inaccurate. The simple answer to that is that it is just not reasonable to expect that DCC would not or should not have known the actual volumes of work provided. Even if DCC in fact was not aware of the discrepancies when it computed its bid, DCC must be charged with constructive knowledge of the actual figures.

In the course of these proceedings, the FCC has advanced various other reasons for canceling the solicitation. DCC challenges them on the basis that they were developed in response to the Claims Court suit and the protest and were not identified by the contracting officer in the notice of cancellation as a basis for cancellation. We point out that while the cancellation notice did only refer to inaccurate estimates and unfair competitive advantage, that would not estop the agency from establishing that it did have other reasons for canceling. The record before us, however, is not fully developed with respect to these other reasons, and we were not able to develop the record further in view of the court's request that we issue this decision by December 6. Therefore, we have not considered whether the other reasons advanced by the FCC independently justify the cancellation.

The protest is denied.

[B-207994]

Miscellaneous Receipts—Special Account *v.* Miscellaneous Receipts—Refund of Excess Payments *v.* Sale Proceeds—Membership in International Organizations

Repayments of money the United States has contributed to the International Natural Rubber Organization (INRO), which have been returned as excess due to the contributions of new members to the INRO or due to a reduction in the amount of rubber imported by the United States, are refunds and may be credited to the appropriation enacted for contributions to INRO. Repayments which constitute proceeds of the sale of rubber may not be credited to the account but must be deposited into the Treasury as miscellaneous receipts.

International Organizations—International Natural Rubber Organization—Excess Membership Contributions—Retention and Investment

General Accounting Office (GAO) has no legal objection to the retention of excess funds in an account where they will be invested by the INRO for the benefit of individual member governments, as the fund will be in custody of the INRO itself rather than of the United States. However, any earnings or interest from these investments received by the United States must be deposited in the Treasury as miscellaneous receipts.

Miscellaneous Receipts—Interest—Investments—Interest/Earnings Paid to U.S.—Excess Funds in International Organization's Custody

General Accounting Office (GAO) has no legal objection to the establishment of a separate account for deposit of excess funds pursuant to the International Natural Rubber Agreement under which the United States has management and investment control yet physical custody of the funds remains with the INRO. However, any funds actually received by Treasury must be deposited into miscellaneous receipts.

Matter of: International Natural Rubber Organization—Return of United States Contribution, December 6, 1982:

The Deputy General Counsel of the Department of the Treasury has requested this Offices's advice on the disposition of certain temporary excess funds now held by the International Natural Rubber Organization (INRO) and available for distribution to several INRO member countries, including the United States. The funds in question include a portion of the United States' initial contribution to the INRO's buffer stock account for the acquisition and maintenance of a stockpile of natural rubber as provided for in the International Natural Rubber Agreement, U.N. Doc. No. TD/rubber/15/Rev. 1 (effective October 1, 1980). Funds currently are available to return to the original member countries either (1) because additional members have joined the Agreement and their initial countributions have increased the total organization funds beyond what is immediately necessary for current buffer stock operations; or (2) because the United States' proportionate share has been reduced based on a comparison of the amount of rubber it has imported in relation to the amount imported by other member countries (a "reduction in trade share," as termed by the Department of Treasury). It is also possible that proceeds from the sale of rubber might be returned to the United States, although it is not clear that the INRO has the authority to do so prior to the termination of the Agreement.

The Department of the Treasury anticipates that in the future the INRO will ask member countries for additional contributions to the buffer stock fund. It also expects that from time to time the INRO will continue to distribute excess funds resulting from buffer stock operations.

The Treasury Department received an appropriation for $88 million for contributions required by the Agreement, under Pub. L. No. 96-369, 94 Stat. 1351 (1980), Pub. L. No. 96-536, 94 Stat. 3166 (1980), and Pub. L. No. 97-12, 95 Stat. 95 (1981) (each incorporating H.R. 7583, 96th Cong., 2d Sess. (1980)). The full amount has been obligated for the United States' fulfillment of its obligations under the Agreement. The appropriation was charged with the initial United States contribution of about $5 million to the INRO.

The issue on which Treasury has requested our opinion involves the treatment of excess funds. The INRO has offered its members three options for the distribution of excess funds. At the request of the members, the INRO will (1) physically return the funds to the member country; (2) retain the funds in an account where they will be invested by INRO for the benefit of individual member governments or (3) establish a separate account for the particular member's excess funds, over which the member will retain investment control.

The Treasury Department would prefer Option One, but only if the funds could be redeposited into the account set up to fund the INRO. If Option One would necessitate the deposit of the monies into the general fund of the Treasury, it is our understanding that the Treasury Department would prefer either Option Two or Option Three.

In our opinion, the Treasury Department may legally exercise any of the three options. If Option One is exercised, the returned funds may be recredited to the appropriation account only if they represent a reduction in the United States contribution due to increased membership in the INRO or the reduction of the United States trade share. If, on the other hand, any portion of the repayment is derived from the sale of rubber, the entire repayment must be deposited in the Treasury as miscellaneous receipts. Our reasons are discussed below.

Option One

As a general proposition, absent specific statutory authority all funds received for the use of the United States must be deposited in the general fund of the Treasury as miscellaneous receipts. 31 U.S.C. § 3302 (formerly § 484).[1] However, there are two instances in which this general rule does not apply. The first is in the case of a revolving fund. In a revolving fund, Congress authorizes the continuous provision of a service and, after an initial capital contribution to the fund, permits the continuing services to be financed by the income generated by the activity itself. By specific statutory authority, payments to a revolving fund are recredited to the fund account and are immediately available for obligation.

[1] Title 31 was recodified by Pub. L. 97-258, September 13, 1982.

The appropriation for United States contributions to the INRO's buffer stock account does not contain authority to set up a revolving fund. Further, such authority was not sought at the time the appropriation was requested. *See,* FY 1981 Budget Estimate, Treasury Department, *reprinted with*, 4 Hearings on H.R. 7583 before H. Subcomm. on Treasury, Postal Service and General Government Appropriations, 96th Cong., 2d Sess. 431-32 (1980) ("House Hearings").

The second exception to the general rule requiring deposit of funds into miscellaneous receipts relates to certain permitted repayments to appropriations. These repayments to appropriations are classified into two specific categories: reimbursements and refunds. See *GAO Policy and Procedures Manual for the Guidance of Federal Agencies,* Title VII, section 13. Reimbursements are sums received as a result of commodities sold or services furnished either to the public or to another Government account, which are authorized by law to be credited directly to a specific appropriation. GAO, *Glossary of Terms Used in the Federal Budget Process,* p. 74 (PAD-81-27, March 1981). In the case of the INRO Agreement, the return of money directly to the appropriation has not been authorized by law. Thus, the question narrows itself to whether the funds returned by INRO are refunds.

Refunds are defined in Title VII, section 13.2(2) of the Policy and Procedures Manual as follows:

> Refunds are repayments for excess payments and are to be credited to the appropriation or fund accounts from which the excess payments were made. * * * [R]efunds must be directly related to previously recorded expenditures and are reductions of such expenditures.

Refunds are also explained in Treasury Department—GAO Joint Regulation No. 1, reprinted as Appendix B to Title VII of the Policy and Procedures Manual. The Joint Regulation description is as follows:

> Refunds to appropriations * * * represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed * * *.

If the funds to be distributed by the INRO can be classified as refunds, they may be recredited to the appropriation account to be available for obligation when future contributions are required.

When the return of funds is due to the reduction of the initial United States contribution, either because of the addition of new member countries or the lowering of the United States trade share, the return can be considered an adjustment to an amount previously disbursed, and, therefore, a refund. Thus, amounts returned from the INRO for those reasons may be credited to the appropriation and used for future contributions without congressional action. *Cf.* 39 Comp. Gen. 647 (1960) (amounts refunded to the United States due to contract violations may be credited to the appropriation from which the payments were made. Deposit of the

funds into Treasury as miscellaneous receipts would deplete the appropriation and defeat the purpose of the program).

However, a return of funds which results from the buying and selling of natural rubber by the INRO may not be considered a refund. Proceeds from a sale are not excess payments. Once a contribution has been used to purchase rubber, its purpose is fulfilled. Were the money returned to the appropriation account, a revolving fund would be established without Congressional authority. The proceeds from the purchase and sale of natural rubber are more like interest earned on trust funds (B–108439, April 13, 1978) or user fees received from AID employees for Government-provided overseas housing (B–192035, August 25, 1978), both of which we required to be deposited in miscellaneous receipts.

Thus, if Treasury chooses Option One, proceeds of sales must be deposited in miscellaneous receipts. However, returns due to the additional membership of countries or the reduction of the United States trade share may be credited to the appropriation.

We understand that the Treasury Department's intention is to establish a single procedure to be followed for all future disbursements by the INRO. Clearly, if all the funds returned at a given time are due to additional members or a reduction of the trade share (and adequate tracing exists to verify this), the money can be redeposited into the appropriation account. However, as has been informally discussed with the Treasury Department, a problem exists when these funds are commingled with the proceeds of sales of rubber and returned to the U.S. without an adequate means of tracing the basis for the returns. If the basis for the funds cannot be determined, all commingled funds must be deposited into the general fund of the Treasury as miscellaneous receipts.

Option Two

Option Two involves the retention and investment of excess contributions and future earnings by the INRO for the benefit of member nations which elect such treatment. Under Option Two, the INRO would retain the excess funds in the Buffer Stock Account. The INRO would invest the excess funds for the benefit of individual member governments, with income resulting from the retained funds accruing to the individual accounts. Reinvestment of the earnings presumably would result in reduced need for future contributions and increased distribution at the end of the Natural Rubber Agreement.

We have no legal objection to this proposal. In fact, the Congress appears to have contemplated that the INRO would retain accumulated excess fund. During the appropriations hearings at which the Natural Rubber Agreement contribution was discussed, the following interchange occurred between Subcommittee Chairman Steed and two State Department witnesses.

Mr. STEED. * * * [S]uppose you find yourself in a lucrative profitable position. Now you have enough stock on hand to meet your future needs, and you have a lot of cash, what happens with the cash?

Mr. CALINGAERT. Before termination of the agreement?

Mr. ODGEN. Any profits the organization makes would be invested in high-yield bonds or whatever investment the agreement felt was most appropriate. Then at the end of the agreement, any profits would be redistributed to all the member countries on the basis of their contributions to the agreement. So the money would stay in the agreement until the end. House Hearings, *cited above,* at 418.

The INRO itself has not yet determined whether it is authorized to pay out either principal or accrued interest to member countries under Option Two prior to the termination of the agreement. Assuming that the INRO does have this authority, any funds disbursed to the United States, including earnings or interest, must be deposited as miscellaneous receipts (excluding refunds, as discussed above). *See* B-108439, April 13, 1978.

Option Three

Option Three involves retention of credits in the Buffer Stock Account, with the establishment of a separate account in which the investment of funds is controlled by the individual member country. It is basically indistinguishable from Option Two except that INRO would not maintain control over the investments. We have no legal objection to Option Three, as long as INRO maintains physical custody of the funds. As with Option Two, any funds over which Treasury gains physical control must be deposited into miscellaneous receipts.

Conclusion

In summation, the Department of the Treasury may choose Options One, Two, or Three. If it selects Option One, monies returned to the United States due to increased membership in the INRO or the reduction of the United States trade share may be recredited to the appropriation account. However, if any of the returned funds constitute proceeds from the sale of rubber which cannot reasonably be segregated from refunds due to increased membership or reduction of trade share, the entire amount of the return must be deposited as miscellaneous receipts. Options Two and Three present no legal difficulties, as INRO would maintain custody of the funds. However, any funds paid out to the United States prior to the termination of the agreement as a result of the investment, such as earnings or interest, must be deposited as miscellaneous receipts.

[B-208393]

Sales—Bids—Deposits—Insufficiency—Waiver—*De Minimus* Rule

In solicitation for a contract of sale requiring a bid deposit of 20 percent of the bid, a deficiency of $100 on a deposit of $73,522 is *de minimus,* and properly may be waived.

Sales—Bids—Deposits—Personal Checks—Sufficiency of Funds Verification—Right to Financial Privacy Act (1978)

When both Department of Defense manual covering disposal of property and solicitation for contract of sale specifically permit bid deposit to be in the form of a personal check, contracting officer may accept such a check and need not attempt to determine whether it is backed by sufficient funds.

Agents—Of Private Parties—Authority—Contracts—Time for Submitting Evidence—Bid Deposits in Sales Solicitation

Evidence of agent's authority may be established after bid opening, even when solicitation attempts to make submission of such information a matter of bid responsiveness. Alleged back-dating of statement of agent's authority therefore does not affect validity of award.

Contracts—Protests—General Accounting Office Function—Independent Investigation and Conclusions—Speculative Allegations

It is not part of General Accounting Office's bid protest function to conduct investigations to determine whether protester's speculative allegations are valid.

Matter of: Marine Power and Equipment Company, Inc., December 7, 1982:

Marine Power and Equipment Company, Inc. protests the sale of three surplus vessels—two large, covered lighters and an aircraft transportation lighter—under Invitation for Bids No. 60-2048, issued by the Defense Logistics Agency's Defense Property Disposal Service (DPDS). On an "all or nothing" bid for the three items, Alaska Towing Company was high at $367,611.11. Marine Power makes a number of arguments regarding the alleged nonresponsiveness of the high bid. We find these arguments without legal merit, and consider Marine Power's other grounds of protest, including Alaska Towing's alleged violation of criminal statutes, to have no effect on the validity of the award. We therefore deny the protest.

Facts:

The sale in question took place in Pearl City, Hawaii, with bid opening at 9 a.m. on June 22, 1982. The record shows that on June 18, Alaska Towing called from its Seattle, Washington office to ask whether DPDS had received its bid, sent by priority mail; subsequent telephone calls established that up to the morning of bid opening, the bid had not been received. For this reason, the record further indicates, Alaska Towing arranged for an agent to submit its bid. This individual offered his personal check in the amount of $73,422.22 as a bid deposit. When Alaska Towing's bid package arrived on June 23, the firm requested the contracting officer to open it and substitute the bid deposit contained therein for the agent's check. The contracting office refused, on grounds that late bids must be returned unopened to the bidder; Alaska Towing, however,

arranged for an agent (unidentified in the record—possibly the same one who submitted the bid) to pick up the bid package and present the firm's check to the contracting officer. This substitution, the record indicates, was accomplished on either June 23 or June 24.

Marine Power argues that Alaska Towing's bid should have been rejected as nonresponsive because the deposit submitted by the agent was $100 less than the required 20 percent of the bid. In addition, Marine Power alleges that the agent's check was drawn on insufficient funds, and that DPDS improperly accepted the substitute check. Marine Power also argues that Alaska Towing's bid was nonresponsive because it was not accompanied by a notarized statement of the agent's authority, as required by the solicitation, and that such a statement, provided by Alaska Towing after bid opening, was back-dated, so that its submission to DPDS was a criminal act, warranting cancellation of the award. Finally, Marine Power alleges that Alaska Towing's presumed payment to the agent constituted an improper contingent fee.

Bid Deposit Amount:

Marine Power argues that the $100 deficiency on the bid deposit is material, and should not have been waived by the sales contracting officer. However, the agency correctly points out that the Defense Disposal Manual specifically authorizes contracting officers to waive "inconsequential" deficiencies in bid deposit amounts when rejection of the bid would not be in the best interest of the Government. *See* DOD 4160.21-M, Ch. XII, par. C.3.a. (July 1979).

While Marine Power argues that this manual is without the force and effect of law, it is issued pursuant to the Federal Property and Administrative Services Act of 1949, as amended, and we have recognized and applied it previously. *See,* for example, *Marine Power & Equipment Co., Inc.,* B-189693, January 17, 1978, 78-1 CPD 36. Thus, the first issue for our consideration is whether the $100 deficiency in Alaska Towing's bid deposit was "inconsequential."

Since at least 1975, we have given clear expression to the *de minimis* doctrine in protests concerning procurements where bid bonds are required. In *Arch Associates, Inc.,* B-183364, August 13, 1975, 75-2 CPD 106, we held that a bid bond of $55,000, or $284 less than the required 20 percent of the bid—a deficiency of .514 percent—was *de minimis* and could be waived as a minor informality. We see no reason not to apply this rationale to bid deposits, since the purpose of either a bid bond or bid deposit is to protect the Government's interests in the event of the bidder's default. *See generally* 39 Comp. Gen. 796 (1960). A bid bond guarantees that a bidder will execute all documents necessary to create a binding procurement contract; a bid deposit, while applied to the purchase price of the goods being sold by the Government, obligates the bidder not to

withdraw before award and to pay the full purchase price. If the bidder fails to fulfill these obligations, the Government may retain the deposit as liquidated damages. *See* DOD 4160.21-M, Ch. XII, par. M.4.

Alaska Towing's deficiency amounts to .136 percent of the required bid deposit. We see no way in which this deficiency could adversely affect the Government's ability to protect its interests. It is clearly *de minimis,* or in the language of the DOD Manual, "inconsequential," and we find that it was probably waived by the sales contracting officer. Compare *Davisville Construction Co.,* B-190080, December 12, 1977, 77-2 CPD 456 (refusing to apply the *de minimis* doctrine to a 50 percent deficiency); *Capital Coatings,* B-186608, June 28, 1976, 76-1 CPD 416 (refusing to apply *de minimis* to a 16 percent deficiency).

Bid Deposit Check:

1. Alleged Insufficient Funds:

Marine Power's allegation that the personal check of Alaska Towing's agent was not backed by sufficient funds is based on a letter of June 28 from the business partner of the agent to DPDS, protesting rejection of another bid. The letter suggests that the contracting officer either knew or should have known that the agent's check would be dishonored. In advancing this as a basis of protest, Marine Power implies that the contracting officer had an affirmative duty to determine that the check was backed by sufficient funds before making award to Alaska Towing.

Although some of our decisions, B-158864, May 16, 1966, and B-154922, September 23, 1964, for example, indicate that in the past, sales contracting officers have attempted to make such determinations by contacting banks on which personal checks were drawn, we question whether such information would be available today without the agent's authorization because of the restrictions on disclosure of financial records in the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3402 (Supp. IV 1980). Moreover, there is nothing in the Defense Disposal Manual that requires the contracting officer to make this type of determination. Rather, deposits on property sold by the Department of Defense may be in any one or a combination of forms, specifically including personal checks. *See* DOD 4160.21-M, Ch. XII, par. M.4. The general terms and conditions of sale (Standard Form 114C), incorporated by reference in the solicitation for the protested sale, require only that uncertified personal or business checks be first party instruments. If an uncertified check is not paid by the drawee for any reason, 114C states, this form of deposit will no longer be accepted from the bidder who tendered the check. We cannot conclude that the contracting officer should have rejected the agent's personal check, since it was a first

party check and the agent had not, to our knowledge, previously presented uncertified checks that had been dishonored.

We note, however, that both Defense Acquisition Regulation § 7-2003.25 (DAC 76-26, December 15, 1980) and Federal Procurement Regulations § 1-10.102-2 (1964 ed. amend. 184, October 1977) require bid guarantee checks to be in certified or cashier's form, and we are suggesting that, at least for sealed bid sales, DPDS consider adopting a similar policy. Personal checks may not adequately protect the Government's interests, since they are subject to such events as insufficient funds and stop payment orders, and do not represent the firm commitment required to form binding legal contracts. See *Edward D. Griffith,* B-188978, August 29, 1977, 77-2 CPD 155.

2. *Substitution of Checks:*

Marine Power argues that the substitution of Alaska Towing's check for that of the agent on the day following bid opening constituted an improper acceptance of a late bid deposit. In the absence of clear evidence that the agent's check would have been dishonored, and in view of our determination that it was an adequate bid deposit, both as to amount and form, we believe the substitution was simply the replacement of one valid negotiable instrument acceptable as a bid deposit by another. Therefore, we do not agree that the acceptance of Alaska Towing's check was improper.

Evidence of Agent's Authority:

Marine Power further argues that Alaska Towing's bid was nonresponsive because it was not accompanied by a notarized statement from the agent detailing the arrangement between the principal and the agent, together with a copy of the agency agreement. Although such a statement was required by the solicitation, the record shows that the only evidence of the agent's authority at the time of bid opening on June 22 was the individual's signature as "agent for Alaska Towing." However, in a telephone call to the sales contracting officer on June 23, the president of Alaska Towing referred to both his "agent" and his "agent's check." DPDS received a notarized statement of agency from Alaska Towing, dated June 18, on July 1, 1982.

Despite specific solicitation provisions that attempt to make evidence of an agent's authority a matter of bid responsiveness, we have repeatedly held that such evidence may be submitted after bid opening. See *Cambridge Marine Industries, Inc.,* 61 Comp. Gen. 187 (1981), 81-2 CPD 157, citing 49 Comp. Gen. 527 (1970). Thus, Marine Power's protest on this basis is without legal merit.

Alleged Criminal Activities:

Marine Power also alleges that the statement of agency was back-dated, and that its submission to the Government by Alaska

Towing violates the False Statements Act, 18 U.S.C. § 1001 (1976). Regardless of the date it was executed, this notarized statement of agency could have been submitted any time before award, and in our opinion the June 18 date therefore is irrelevant with regard to the validity of the award. If Marine Power believes its evidence of a false statement is sufficient to warrant submission of the matter to the Attorney General, we see no reason why it may not take such action.

As for Alaska Towing's alleged breach of the convenant against contingent fees, Marine Power has no direct knowledge of the arrangements between Alaska Towing and its agent, and merely presumes that the agent was paid for his services. Payment for services rendered, however, would not necessarily constitute a contingent fee. Marine Power's statement is speculative, and it is not part of our bid protest function to conduct investigations in order to establish the validity of such allegations. See *Alan Scott Industries,* B-201743 *et al.,* March 3, 1981, 81-1 CPD 159, *aff'd on reconsideration,* April 1, 1981, 81-1 CPD 251.

The protest is denied.

[B-206105]

Statutes of Limitation—Claims—Filing in Other Than GAO—Does Not Meet Requirements of 10/9/40 Act, As Amended

Employee of Forest Service claims per diem in connection with transfer to seasonal worksite every 6 months for period from May 7, 1973, through Nov. 19, 1976. Claim was subject of grievance proceeding in agency and was not received in General Accounting Office (GAO) until Jan. 18, 1982. Portion of claim arising before Jan. 18, 1976, may not be considered since Act of Oct. 9, 1940, as amended, 31 U.S.C. 71a, bars claims presented to GAO more than 6 years after date claim accrued. Filing with administrative office concerned does not meet requirement of Barring Act.

Subsistence—Per Diem—Headquarters—Permanent or Temporary—Seasonal Worksites—Transfer Orders Not Issued

Employee of Forest Service grieved entitlement to per diem in connection with assignment to seasonal worksite every 6 months. We agree with the Grievance Examiner's factual determination that the employee was in a temporary duty status and therefore entitled to per diem as provided for in the Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employees maintained their permanent homes at their official duty station while living in Government quarters at the seasonal worksite.

Matter of: Frederick C. Welch—Per diem entitlement—Barring Act, December 8, 1982:

ISSUE

We have been asked to decide whether the Department of Agriculture may implement a Grievance Examiner's award requiring the retroactive payment of per diem to an employee during a 6 month tour of duty at a seasonal worksite. Pursuant to the following analysis the grievance award may be implemented in a modi-

fied amount only with respect to that period of the claim which is not barred by operation of 31 U.S.C. § 71a (1976), now § 3702.

HISTORY OF CASE

Anita R. Smith, an Authorized Certifying Officer with the National Finance Center of the United States Department of Agriculture, has petitioned this Office, under 31 U.S.C. § 82d (1976), now § 3529, for a review of a Grievance Examiner's recommended award—accepted by the final decision of the Acting Director of Personnel—in an agency grievance filed by Mr. Frederick C. Welch. The essential facts will only be summarized here as a composite of materials submitted by the certifying officer, Mr. Welch, and the Acting Director of Personnel's final decision.

Mr. Welch, now a former employee of the Forest Service, Department of Agriculture (agency), filed an informal grievance with the agency on October 12, 1976, claiming per diem and mileage entitlements for the period May 7, 1973, through November 19, 1976. During this period Mr. Welch was an employee of the Idaho Panhandle National Forest, St. Maries, Idaho, Ranger District. Mr. Welch had a permanent residence in St. Maries, Idaho, and from October to May he worked in St. Maries. From May to October of the years in question, Mr. Welch was assigned to the Red Ives Ranger District (RIRD) which was about 90 miles away from St. Maries. The agency authorized official travel for one trip in and out of the RIRD each season. The record shows that for the years 1971 and 1972 the agency processed personnel actions at the beginning and end of each season changing Mr. Welch's official station from St. Maries to the RIRD and back again. However, for the years 1973 through 1976 the agency required Mr. Welch to move from St. Maries to the RIRD every summer and back to St. Maries in the winter, but did not process any personnel actions as had been done in the previous years. During this time Mr. Welch received living quarters and utilities free from the Government at RIRD.

Mr. Welch's grievance alleged that the move every summer from St. Maries to the RIRD placed a hardship and extra expenses on him and he contended that since all of his personnel documents during the period of his claim showed St. Maries as his official duty station he should have been considered in a travel status while at the RIRD. As a result he grieved an entitlement to per diem while at the RIRD including travel from and to St. Maries during these periods. The Forest Service took the position that Mr. Welch had "dual official stations"; and as a result, he was not entitled to per diem at either St. Maries or RIRD because paragraph 1-7.6a of the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), precludes reimbursement expenses at an employee's official duty station.

On December 13, 1976, the Forest Supervisor denied Mr. Welch's informal grievance. Mr. Welch then filed a formal grievance with the head of the Forest Service on February 22, 1977. On December 12, 1979, the Grievance Examiner issued his findings and recommended decision on Mr. Welch's grievance, concluding that Mr. Welch was in a temporary duty status while he was at the RIRD and thus, he was entitled to per diem. In this regard the Grievance Examiner found that Mr. Welch was entitled to a per diem rate figured on the lodgings plus $16, not to exceed $35 per day; and, since the lodging was furnished at no cost to Mr. Welch, his per diem rate would be $16 per day less $4 for each meal furnished at no cost to him. The Grievance Examiner's recommended decision was that Mr. Welch file vouchers for those periods he was assigned to RIRD and that the agency process the vouchers.

The agency challenged the recommended decision on the grounds that Mr. Welch was not in a travel status; the RIRD was not considered a temporary duty location for Mr. Welch but rather his permanent duty site for an assigned period of time; and that if the recommended decision was to be followed, the agency would be paying per diem at the employee's official station which would not be proper. In bringing the grievance at the next stage to the Director, Office of Personnel, Department of Agriculture, for a final decision, the agency again emphasized that the RIRD seasonal worksite was not considered temporary duty location for Mr. Welch. The agency admitted that Mr. Welch was directed to and from the RIRD each year and that they did not process personnel actions at the beginning and end of each season changing Mr. Welch's official station. However, citing our decision in 32 Comp. Gen. 87 (1952), the agency argued that an employee's permanent duty location is a matter of fact and not necessarily one of administrative designation, thus, as a matter of fact, the RIRD was Mr. Welch's official duty station while he was there.

On February 11, 1981, the Acting Director of the Office of Personnel, Department of Agriculture, issued his final decision concurring with the Grievance Examiner's recommendation that Mr. Welch was in temporary duty status while assigned in the RIRD and, therefore, entitled to per diem. In so concluding the Acting Director addressed the agency's argument concerning Mr. Welch's official duty station as follows:

> In the case cited by the Agency the Comptroller General held that an employee in Washington, who maintained a residence in Philadelphia to which he traveled for personal reasons but who performed all his work in Washington, has an official duty station at the latter place and was not entitled to per diem in lieu of subsistance at either place. In the case at hand the employee is asked by the Agency to move every summer and fall.
>
> Other than stating in its rebuttal to the recommended decision that "Red Ives Ranger Station seasonal worksite was not considered a temporary duty location for Mr. Welch, but rather his permanent duty site for an assigned period each year," the Agency has submitted no evidence to substantiate this claim. It must be pointed out the Agency has not reconciled this statement with the one made in its Request for Remote Duty Location memorandum quoted above. [That memorandum stated

"* * * Living quarters and utilities are furnished in lieu of per diem for those employees whose official duty station is shown as St. Maries, Idaho."] The Agency has admitted that it did not process AD-350's showing the change in duty station and the AD-350's in the file show that St. Maries was Mr. Welch's official duty station, it follows, therefore, that Mr. Welch's official duty station was St. Maries throughout the year from 1973 onwards.

The Acting Director decided that Mr. Welch was entitled to per diem as stated in the Grievance Examiner's recommended decision.

BARRING ACT

The Act of October 9, 1940, Chapter 788 §§ 1, 2, 54 Stat. 1061, as amended by section 801 of Public Law 93-604, 88 Stat. 1965, approved January 2, 1975, 31 U.S.C. § 71a, provides that every claim or demand against the United States cognizable by te General Accounting Office must be received in this Office within 6 years from the date it first accrued or be forever barred.

Under that provision of law, as a condition precedent to a claimant's right to have his claim considered by the General Accounting Office, his claim must have been received in this Office within the 6-year period. Filing a claim with any other Government agency does not satisfy the requirements of the Act. *Nancy E. Howell,* B-203344, August 3, 1981, and *Russel T. Burgess,* B-195564, September 10, 1979. Nor does this Office have any authority to waive any of the provisions of the Act or make any exceptions to the time limitations it imposes. *Nancy E. Howell* and *Russel T. Burgess* above.

This is so even though the delay at the agency level was the fault of the agency and not that of the employee. *Jerry L. Courson,* B-200699, March 2, 1981. After the enactment of Public Law 93-604, which was effective July 2, 1975, reducing the limitation period from 10 years to 6 years, the director of our Claims Division, by letter dated March 14, 1975, instructed the heads of all agencies that claims received by them 4 years after the date of their accrual should be forwarded to our Claims Division. This instruction was later incorporated in an amended section 7.1, title 4, GAO Policy and Procedures Manual for Guidance of Federal Agencies. If, however, this instruction is not complied with, we are without authority to waive or modify the application of 31 U.S.C. § 71a. *Jerry L. Courson,* above.

Since Mr. Welch's claim was received in this Office on January 18, 1982, that portion of his claim arising before January 18, 1976, is barred by the above-cited Act and may not be considered by this Office.

OPINION

Regarding that portion of Mr. Welch's claim accruing after January 18, 1976, the certifying officer indicates that the Forest Service remains opposed to the final decision of the agency grievance proc-

ess. Again citing our decision in 32 Comp. Gen. 87 (1952) the agency maintains that Mr. Welch's official duty station is a matter of fact, and not necessarily one of administrative designation. We agree that Mr. Welch's official duty station is a matter of fact but we do not disagree with the judgment made in the agency grievance process that St. Maries was Mr. Welch's official duty station during the period of his claim.

The authority for the payment of a per diem allowance to employees traveling on official business away from their designated post of duty is contained in 5 U.S.C. § 5702 (1976) and the implementing regulations contained in Part 7, Chapter 1, of the FTR. The purpose of per diem is to reimburse an employee for meals and lodging while on temporary duty while he also maintains a residence at his permanent duty station. B-185932, May 27, 1976. Per diem is payable only for periods during which an employee is on official business away from his designated post of duty, and, therefore, an "itinerant" employee must have some place designated as his headquarters or official station. 23 Comp. Gen. 162 (1943).

While the applicable regulation (FTR para. 1-7.1a) states that per diem allowances shall be paid for official travel (except where reimbursement is made for actual subsistence expenses), our decisions have long held that per diem is not a statutory right and that it is within the discretion of the agency to pay per diem only where it is necessary to cover the increased expenses incurred arising from the performance of official duty. 55 Comp. Gen. 1323 (1976); 31 *id.* 264 (1952).

Under the provisions of FTR para. 1-7.6a, an employee may not be paid per diem at his permanent duty station nor at his place of abode from which he commutes daily to his official duty station. The determination of what constitutes an employee's permanent duty station or headquarters involves a question of fact and is not limited by administrative determination. 31 Comp. Gen. 289 (1952) and decisions cited therein. An employee's headquarters has been construed to be the place where the employee expects and is expected to spend the greater part of his time. 32 Comp. Gen. 87 (1952) and 31 *id.* 289 (1952). Such a determination is made based upon the employee's orders, the nature and duration of his assignment, and the duty performed. B-172207, July 21, 1971; 33 Comp. Gen. 98 (1953).

In Mr. Welch's case, he was moved to a site 90 miles away from his permanent abode in St. Maries to a site in the RIRD. The distance from RIRD to St. Maries was so far as to preclude commuting. While at the RIRD Mr. Welch and the other permanent employees so assigned resided in seasonal facilities while maintaining their permanent residences in St. Maries. The record also shows that the Government provided housing facilities at RIRD was rudimentary.

Under the circumstances we find that the final grievance decision was correct to conclude that Mr. Welch did not change his official station from St. Maries when he went to RIRD in the summer. Even though Mr. Welch spent 6 months of the year at RIRD, his assignment there was in the nature of a long term temporary assignment away from his official duty headquarters. See generally 57 Comp. Gen. 147 (1977), allowing per diem for 15 months and 26 months assignments which ran consecutively. It is plain that both the agency and the employees treated the assignment as temporary and treated St. Maries, where the employees' permanent houses were, as the real official duty station. Accordingly, we will not object to the establishment of a per diem entitlement for Mr. Welch in connection with his transfer to the RIRD after January 18, 1976.

We are, nevertheless, required to reduce the amount of the daily per diem entitlement in accordance with the agency's controlling regulation. The final decision in Mr. Welch's case allowed a $16 daily per diem rate predicated on the lodgings plus method set out in an advisory opinion from the agency's fiscal management division. However, paragraph 6543.04a(a) of the Forest Service Manual provides the following per diem rate effective April 15, 1976:

> a. A rate of $8.00 for trips within the Idaho Panhandle National Forests when in travel status at points where *-Government-owned cooking and sleeping ("batching") facilities are available for use by the employee.*

Since Mr. Welch was in a travel status while at the RIRD and since he was provided with housing and utilities, his per diem entitlement for the period he was stationed at the RIRD after January 18, 1976, is limited to $8 in accordance with the agency's regulation.

Finally, in a separate submission to this Office dated February 12, 1982, Mr. Welch claims miscellaneous expenses associated with the documented changes in his official duty station in 1971 and 1972 and interest due on any amounts determined to be allowed in connection with the adjudication of his claim. Mr. Welch's claim for miscellaneous expenses must be denied because this claim was filed here more than 6 years after its accrual. 31 U.S.C. § 71a (1976). As for his interest claim, it is well settled that interest may be assessed against the Government only under express statutory or contractual authority. *Fitzgerald* v. *Staats,* 578 F. 2d 435 (D.C. Cir. 1978). The authority to pay per diem and reimburse travel expenses incurred by an employee while traveling on official business found in Chapter 57 of title 5, United States Code (1976), does not include express statutory authority by which interest may be paid on employee travel claims. This aspect of Mr. Welch's claim must be denied.

[B-207028]

Attorneys—Fees—Equal Access to Justice Act—Recovery of Fees, etc. Incurred in Pursuing Bid Protest—Not Authorized by Act—Adversary Adjudication Requirement

Recovery under the Equal Access to Justice Act of attorney's fees and costs incurred in pursuing a bid protest at General Accounting Office (GAO) is not allowed because GAO is not subject to the Administrative Procedures Act (APA) and in order to recover under Equal Access to Justice Act claimant must have prevailed in an adversary adjudication under the APA.

Matter of: Ex-Cell Fiber Supply, Inc., December 14, 1982:

Ex-Cell Fiber Supply, Inc. requests that the Government Printing Office (GPO) or our Office reimburse it for attorney's fees and costs incurred in pursuing a bid protest filed with our Office. Ex-Cell filed its protest on April 8, 1982, contending that GPO improperly determined that it was nonresponsible and refused to award it a contract under GPO Waste Paper Sale No. 32. GPO subsequently reversed its determination of nonresponsibility and awarded the contract to Ex-Cell. Ex-Cell then withdrew its protest. Ex-Cell contends that under section 203(a)(1) of the Equal Access to Justice Act, 5 U.S.C. § 504 (Supp. IV 1980), it is entitled to reimbursement of the costs incurred in pursuing the protest.

The Act authorizes the award of attorney's fees and other costs to certain parties who prevail against the United States in adversary adjudications conducted by Federal agencies. Eligible prevailing parties are entitled to awards of fees and expenses, unless the presiding officer or judge finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Eligible parties include sole owners of an unincorporated business, or partnerships, corporations, associations, or organizations with a net worth of no more than $5 million and which employ no more than 500 persons.

The Act defines an adversary adjudication as a proceeding under the Administrative Procedure Act (APA), 5 U.S.C. § 554 (1976 and Supp. IV (1980)), in which the position of the United States is represented by counsel or otherwise. Our bid protest proceedings, however, are not held under or governed by the APA since that law does not apply to the legislative branch, of which our Office is a part. *See* 5 U.S.C. § 551(1)(A). Moreover, in rendering bid protest decisions, our Office is not engaging in an adjudication as contemplated by the APA. See *Dorman Electric Supply Co., Inc.,* B-196924, May 20, 1980, 80-1 CPD 347; *compare* 4 C.F.R. Part 21 (1982) with 5 U.S.C. §§ 554-557.

Accordingly, there is no authority under the Equal Access to Justice Act to allow recovery of attorney's fees and costs incurred in pursuing a bid protest before this Office. The claim is denied.

[B-208185]

Leaves of Absence—Court—Witness—Employee-Defendant—State or Local Government-Plaintiff—Traffic Violation

Employee who is summoned to county court for a traffic violation is not entitled to court leave as a witness under 5 U.S.C. 6322 in connection with his appearance in court as a defendant.

Matter of: Entitlement of Employee-Defendant to Court Leave, December 14, 1982:

Mr. John J. Kominski, General Counsel of the Library of Congress (Library), has requested an advance decision as to whether an employee of the library is entitled to court leave under 5 U.S.C. 6322 in connection with his appearance in court in Arlington County, Virginia, pursuant to a summons for a traffic violation. For the reasons set forth below, the employee is not entitled to court leave under 5 U.S.C. 6322 for his appearance in court as a defendant.

Section 6322 of title 5, United States Code, provides in pertinent part that an employee is entitled to leave, without loss of, or reduction in, pay, or leave to which he otherwise is entitled, when in response to a summons in connection with a judicial proceeding, he serves as a juror or as a witness on behalf of any party when the United States, the District of Columbia, or a state or local government is a party to the proceeding.

We have held that the authority of 5 U.S.C. 6322 to grant court leave to a Government employee summoned as a witness in certain proceedings does not extend to an employee who is the plaintiff in such action. See *Matter of Pasake,* 59 Comp. Gen. 290 (1980), and *Matter of Sweeney,* B-201602, April 1, 1981. We note that the above-cited cases involved discrimination actions against the employing agency under title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.).* We further note that by Federal Personnel Manual Bulletin 630-38, August 4, 1980, the Office of Personnel Management has provided Federal agencies instructions consistent with the holding in Pasake.

We see no reason why the rule adopted in the *Pasake* and *Sweeney* cases should not be for application where the employee is a defendant in the court action concerned. Neither the language of 5 U.S.C. 6322 nor the legislative history indicates that court leave is available to an employee who is a party in the court action for which he is summoned and in which the Government of the United States is not involved.

Accordingly, we do not consider a defendant in a court case to be entitled to court leave as a witness under 5 U.S.C. 6322. Thus, the employee concerned is not entitled to court leave in connection with his appearance in court as a result of his summons for a traffic violation.

[B-203762]

Subsistence—Actual Expenses—Maximum Rate—Reduction—Meals, etc. Cost Limitation—Lodging Costs Incurred

Volume 2 of Joint Travel Regs. does not specify across-the-board dollar limitation for purpose of determining reasonableness of actual subsistence claims for meals and miscellaneous expenses. In this case, accounting and finance officer considered a meal expense to be excessive and applied a dollar limitation to reimbursement. Absent sufficient justification for the higher dinner cost, that action is upheld. It is noted that provisions of 2 JTR para. C4611 limit meal and miscellaneous expenses reimbursement to 50 percent of high cost area rate in specific situations where lodging costs are not incurred. A similar limitation for application to subsistence expenses claims involving commercial lodging costs could be applied.

Matter of: R. Edward Palmer, December 15, 1982:

An accounting and finance officer for the Defense Logistics Agency, Marietta, Georgia, requests an advance decision regarding his authority to limit an employee's reimbursement for meal expenses in a high cost area. The submission was approved by the Per Diem, Travel and Transportation Allowance Committee and has been assigned Control No. 82-3.

The voucher that gives rise to this decision was submitted by Mr. R. Edward Palmer in connection with his temporary duty assignment to Philadelphia, Pennsylvania. Philadelphia is a high cost area for which actual subsistence expenses not in excess of $75 per day may be reimbursed. Mr. Palmer's claim for May 27, 1981, is based on lodging costs of $31.80 and $45.50 for meals, including $38 for a single dinner. Considering this meal expense to be excessive and based on information indicating that the General Accounting Office limits its employees' daily reimbursement for subsistence expenses other than lodgings to $28, the accounting and finance officer disallowed Mr. Palmer's claim for meal expenses in excess of $28. In submitting his reclaim voucher for $15.20, Mr. Palmer states that the meal expenses in question are consistent with what he would incur if traveling on personal business. He questions the accounting and finance officer's authority to limit reimbursement for meal costs actually incurred.

In response to an initial inquiry concerning the extent of his authority to limit reimbursement for meal expenses, the Per Diem, Travel and Transportation Allowance Committee advised the accounting and finance officer that Volume 2 of the Joint Travel Regulations does not give individual Department of Defense (DOD) components authority to establish a maximum amount which may be reimbursed for meals purchased in high cost areas. The Committee pointed out that each disbursing officer, nevertheless, has a responsibility to question unreasonable meal costs and that it is the responsibility of the DOD component involved to make a determination of reasonableness in any given case. In asking that the matter be submitted to this Office for decision, the accounting and finance officer explains that the case-by-case determination con-

templated by the Committee results in almost continual confrontation with travelers over the reasonableness of subsistence expenditures. For the purpose of reviewing actual subsistence expense claims and to provide guidance to those assigned to temporary duty in high cost areas, he asks whether he may treat the $28 maximum prescribed for travel by General Accounting Office employees as *de facto* guidance as to the reasonableness of amounts spent for meals. In addition, he questions the claimant's suggestion that it is appropriate to consider an individual employee's income level and lifestyle in determining whether an expenditure is reasonable and prudent.

Under 5 U.S.C. 5702(c), a DOD employee may be reimbursed actual and necessary expenses for travel to a high cost area in an amount not to exceed the maximum rate prescribed by the Administrator of General Services in the Federal Travel Regulations (FPMR 101-7) (May 1973, as amended) (FTR) and reflected at Appendix E of Volume 2 of the Joint Travel Regulations (2 JTR). Within that maximum, an employee's reimbursement is subject to the following general limitations set forth at FTR para. 1-1.3:

a. *Employee's obligation.* An employee traveling on official business is expected to exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business.

b. *Reimbursable expenses.* Traveling expenses which will be reimbursed are confined to those expenses essential to the transacting of official business.

See also 2 JTR para. C4464. Under these authorities, we have held that employees are only entitled to be reimbursed for reasonable meal expenses. *Matter of Frisch,* B-186740, March 15, 1977.

The agency's responsibility for the authorization and reimbursement of actual subsistence expenses is outlined in paragraph 1-8.3b of the FTR as follows:

b. Review and administrative controls. Heads of agencies shall establish necessary administrative arrangements for an appropriate review of the justification for travel on the actual subsistence expense basis and of the expenses claimed by a traveler to determine whether they are allowable subsistence expenses and were necessarily incurred in connection with the specific travel assignment. Agencies shall ensure that travel on an actual subsistence expense basis is properly administered and shall take necessary action to prevent abuses.

This regulation serves a dual function. It requires an agency determination of the reasonableness of actual subsistence expenses and it gives the agency authority to issue written guidelines to serve as a basis for review of an employee's expenses. *Matter of Davis,* B-197576, September 8, 1980, and *Matter of Kephart,* B-186078, October 12, 1976.

As discussed in *Matter of O'Brien,* B-187344, February 23, 1977, the regulations of the General Accounting Office impose a limitation by dollar amount (currently $28) on the actual subsistence expenses other than for lodgings that may be reimbursed incident to travel to a high cost area. In the absence of unusual circumstances justifying a higher amount, this limitation is applicable regardless

of whether the employee incurs or does not incur lodging costs. We have also recognized that an agency may limit reimbursement to a percentage of the maximum rate, provided that limitation does not serve as an absolute bar to payment of additional amounts that can be adequately justified. Thus, in *Matter of Bayne,* B-201554, October 8, 1981, 61 Comp. Gen. 13, we sustained agency action imposing a limitation of 46 percent of the statutory maximum on meals and miscellaneous expenses incurred while lodging at no cost with friends or relatives in a high cost area. In each of these instances, the limitation was imposed by agency action and not by the individual certifying or disbursing officer.

Department of Defense guidance concerning actual expenses reimbursement is contained in 2 JTR, Chapter 4, Part M. Some criteria are contained in these regulations regarding maximum expenses allowable for meals when actual expense reimbursement is authorized. For example, actual subsistence expense reimbursement is limited to 50 percent of the maximum amount prescribed for a particular high cost area on any day during which lodgings are not required, a lodging cost is not incurred or Government quarters are available. 2 JTR para. C4611-1e. The same 50 percent limitations on meals and miscellaneous expenses is imposed when an employee performs temporary duty at the place of his family's domicile or when he stays with friends or relatives. 2 JTR 4611-1h, 4611-1i. Larger expenditures are allowable in unusual circumstances as justified in the individual case. However, these regulations do not specify a maximum amount that may be reimbursed for meals and miscellaneous expenses when an employee also incurs lodging expenses in a high cost area. And, as indicated by the Per Diem, Travel and Transportation Allowance Committee, the regulations do not delegate to individual DOD components or disbursing officers the authority to establish specific maximums for this purpose.

We feel that the regulatory provision cited would provide a reasonable basis for an accounting and finance officer to adopt a 50 percent guideline for the purpose of reviewing claims for actual subsistence expenses for meals and miscellaneous expenses, when lodgings costs are involved. The disbursing officer in this case did not use that guidance but adopted another criteria based upon the General Accounting Office practices. On July 10, 1981, he issued a command policy which adopted the $28 subsistence limitation used in Mr. Palmer's case. While the Joint Travel Regulations do not establish maximum guidelines for meal reimbursement, we do not find that those regulations restrict the action of an individual disbursing officer to the extent that the action taken in this case to limit reimbursement to Mr. Palmer was prohibited. However, the July 10, 1981 policy appears to be inconsistent with the views expressed by the Committee.

Mr. Palmer submitted a meal claim which the disbursing officer considered to be excessive. His only explanation of the high cost of the meal was that he was accustomed to pay that much for meals because of his overall lifestyle. We agree with the disbursing officer's conclusion that this explanation is not sufficient to justify payment of the excessive costs. The effect of his use of the $28 maximum was to allow the sums actually expended for breakfast and lunch ($7.10) and the balance for dinner. Absent a further justification for the high dinner cost, our Office will not question the action taken.

Accordingly, no additional amount is payable to Mr. Palmer for reimbursement of his actual expenses on May 27, 1981.

Regarding Department of Defense policy and regulation concerning the disallowance of excessive meal costs when individuals are entitled to subsistence on an actual expense reimbursement basis, we reaffirm that it is the primary responsibility of the approving official within the guidelines established by his agency to determine when excessive meal costs are claimed and to establish allowable reimbursement.

Regarding the disbursing officer's attempt to fix a dollar limit for reimbursement of meal expenses which he would pay without further explanation, we have suggested that agencies adopt guidelines in order to put individual travelers on notice of the amount which may be claimed for meals without providing specific justification for their high cost. We feel that guidelines in terms of a percent or a specific dollar figure can benefit both the traveler and the approving official. The Department of Defense has provided guidelines for determining excessive meal costs only in limited situations. Officials responsible for approving travel vouchers are subject to those guidelines. In this case specific guidelines were not applicable. By letter of today we have asked the Per Diem, Travel and Transportation Allowance Committee to consider giving DOD components more definitive guidance in the travel situation covered in this decision.

[B-206589, B-206579, B-201286]

Treasury Department—Treasurer of United States—Relief—Duplicate Check Losses—Appropriation Adjustment—Statutory Authority Status

Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527 (c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted.

Accountable Officers—Accounts—Settlement—Statutes of Limitation—Duplicate Check Losses

In duplicate check case (loss resulting from improper negotiation of both original and replacement checks), 3-year statute of limitations contained in 31 U.S.C. 82i (now sec. 3526) begins to run when loss is reflected in disbursing officer's statement of accountability following receipt of Treasury Department's debit voucher, not when replacement check was issued.

Accountable Officers—Relief—Debt Collection—Diligence in Pursuing

Granting of relief under 31 U.S.C. 82a-2 (now secs. 3527 (c) and (d)) does not relieve agency from duty to pursue collection action against recipient of improper payment, and GAO may deny relief if agency has failed to diligently pursue collection action. Exactly what constitutes diligent collection action may vary according to facts and circumstances of particular case, but as general proposition, a single letter to debtor is not enough.

To the U.S. Army Finance and Accounting Center, Department of the Army, December 16, 1982:

This responds to four separate requests for the relief of various Army Finance and Accounting Officers under 31 U.S.C. § 82a-2 (1976).[1] For the reasons stated below, relief is granted in three of the cases and is no longer necessary in the fourth. The cases are all "duplicate check" cases in which a payee has negotiated both an original check and a replacement check. In the typical situation (the facts of the four specific cases will be discussed later), a check is issued in payment of some valid obligation. The payee alleges non-receipt and is issued a replacement check. Subsequently, the payee negotiates both checks, resulting in a loss to the Government.

These specific cases have served to focus our attention on a difficult and complex question concerning the proper way to handle "duplicate check" cases in general, and it is necessary to address this issue in some detail before resolving the specific cases at hand.

Pertinent Statutory Relief Provisions

Before reaching the merits of any particular case, the threshold question is the proper statutory authority under which to account for duplicate check losses. The four subject cases were submitted under 31 U.S.C. § 82a-2 (1976). This statute authorizes the General Accounting Office to relieve disbursing officers from liability for illegal, improper, or incorrect payments upon finding, either independently or in concurrence with written determinations by the agency concerned, that the payment was not the result of bad faith or lack of due care on the part of the disbursing officer. The granting of relief does not affect the liability of the recipient of the payment, and GAO may deny relief if it determines that the agency

[1] Title 31 of the United States Code was recently recodified by Pub. L. No. 97-258, enacted on September 13, 1982. Since the new Title 31 has not yet been widely circulated, we have used the "old" 31 U.S.C. citations throughout the text for convenience. The new citations for statutes cited in the text are as follows: § 82a-2 is now § 3527 (c) and (d); § 156 is now § 3333; § 528 is now § 3331.

has not diligently pursued collection action to recover the improper payment.

The question arises by virtue of the existence of another statute, 31 U.S.C. § 156, under which GAO relieves the Treasurer of the United States for losses resulting when checks drawn on the Treasurer are "paid in due course and without negligence by or on behalf of the Treasurer of the United States."

Requests for relief under 31 U.S.C. § 82a-2 are made individually by the agency whose disbursing officer is accountable for the loss. Requests under 31 U.S.C. § 156 are made by the Treasury Department. Treasury's practice has been to accumulate the cases and to submit them in large groups. See, *e.g.*, B-115388, October 12, 1976. The Treasurer of the United States is not a "disbursing officer" for purposes of 31 U.S.C. § 82a-2. B-141329, February 26, 1960.

Under 31 U.S.C. § 82a-2, GAO is authorized to restore the accountable officer's account by charging the loss to the agency's operating appropriations available at the time the adjustment is made. 31 U.S.C. § 156 contains no similar authority.

On the surface, either statute appears available, at least in theory, to handle duplicate check losses. The issue here thus becomes which one is proper and under what circumstances.

The Duplicate Check Problem: Analysis and Observations

Accounting for duplicate check losses has caused perplexing problems for many years. In a 1981 report to the Congress entitled "Millions Paid Out in Duplicate and Forged Government Checks," AFMD-81-68, October 1, 1981, we discussed the problems in detail. Some of the problem areas we noted which are relevant to this discussion are as follows:

(1) There are at present no appropriations against which to charge duplicate check losses that are handled under 31 U.S.C. § 156. The Treasury Department has not requested appropriations to cover the expenditures and, as noted above, the statue does not authorize charging the losses to current operating appropriations. Treasury has thus been carrying the losses indefinitely as "accounts receivable."

(2) Treasury has "charge-back" agreements with some agencies, under which Treasury transfers the collection and accounting responsibility back to the agencies. Some agencies charge the losses to appropriations but others apparently do not. Also, there are many agencies with which Treasury has no such agreements.

We concluded that the problems resulting from duplicate check payments are complex and warrant congressional involvement. We made a number of recommendations both to the Congress for legislative revisions and to the Treasury Department for administrative action. Pending action on these recommendations, we also concluded that it would be inappropriate for us to disturb existing practice. We said on page 14 of the report that "we do not object to the con-

tinued issuance of the checks, provided the problems we cited are resolved within a reasonable time."

Against this background, we now proceed to make several observations about the various statutes. As will be seen, no solution we can devise at this time is wholly satisfactory.

One approach would be to hold simply that 31 U.S.C. § 82a-2 is the proper vehicle for handling duplicate check losses. This would have two advantages: first, it would permit losses to be charged against current appropriations, and second, it would place primary collection responsibility with the agencies, who are in a better position to take effective collection action.

However, we are inclined to view 31 U.S.C. § 82a-2 as inappropriate for dealing with duplicate check losses. The responsibility for issuing replacement checks lies primarily with the Treasury Department. 31 U.S.C. § 528. For the most part, the agency disbursing officer acts as little more than a "middle-man" to transmit the payee's request to Treasury. Also, as we stated in B-71585, August 15, 1956:

> The shortage in the account of the Treasurer here involved arose not from the issuance of the substitute checks, which issuance was proper and authorized by law, but rather from the payment by the Treasurer of both the original and substitute checks in due course and without negligence.* * * Accordingly, the provisions of [31 U.S.C. § 82a-2] are not applicable here.

Thus, the loss in a duplicate check case occurs when the second check is wrongfully presented and paid. (The actual sequence in which the payee negotiates the original check and the replacement check is immaterial.) This happens because Treasury, contrary to 31 U.S.C. § 156, honors the second check even where the first check has already been paid. Although an improper payment has clearly occurred, it is totally beyond the responsibility and control of the agency disbursing officer and is something for which he should incur no liability. Also, treating these as "§ 82a-2 cases" would have the effect of rendering 31 U.S.C. § 156 largely meaningless, and we must assume that Congress enacted § 156 to serve a purpose.

Another approach would be to hold that 31 U.S.C. § 156 is the proper vehicle for handling duplicate check losses. This also has several advantages: it gives meaning to both statutes; it protects agency disbursing officers against potential liability for a loss over which they have absolutely no control; and it is logical since it is Treasury that pays the replacement check and it is Treasury that has the opportunity to avoid the improper payment. However, this approach would exacerbate the appropriation problem noted above and would have the effect of negating Treasury's charge-back agreements.

Underlying either approach is the basic question of whether an agency's appropriations are available to pay both checks. Whatever the answer to this question may be, we think it should apply equal-

ly to all agencies and should not vary depending on whether a given agency has voluntarily entered into, or refused to enter into, a charge-back agreement with Treasury.

In two earlier decisions, one before and one after the enactment of 31 U.S.C. § 82a-2, we held that duplicate check losses could be charged to the appropriations against which the original checks were drawn, even though relief had been granted to the Treasurer under 31 U.S.C. § 156. B-71585, August 15, 1956; B-109397, November 24, 1952. (Both cases involved trust funds.) While this combination of concepts—relief under § 156 and a charge to agency appropriations—may well form the nucleus of the ultimate resolution of the problem, our review of the cases now suggests that the premise upon which they were based may have been incorrect. The basis for our holdings in B-71585 and B-109397 was the clause in 31 U.S.C. § 528(a) authorizing Treasury to issue replacement checks "against funds available for the payment of the original check." However, on reflection, this clause seems to contemplate that, since the original check was presumably lost or destroyed, only one check and not two would be paid. This view is reinforced by another portion of 31 U.S.C. § 528(a) which prohibits payment of the replacement check if the original check has already been paid. We doubt that the quoted clause was intended to authorize charging both checks to agency appropriations.

Taking all of these factors into consideration, we are on the one hand reluctant to hold that 31 U.S.C. § 82a-2 is the proper statute since this result would ignore 31 U.S.C. § 156, a statute apparently designed to deal with precisely this type of situation. Yet on the other hand, we are equally reluctant to negate Treasury's charge-back agreements by holding that 31 U.S.C. § 156 is the proper statute, at least without more extensive discussions with Treasury and the other agencies involved.

In sum, we continue to think, as we said in our 1981 report to the Congress, that the duplicate check problem is one that warrants congressional attention and that we should not object to current practice for a "reasonable time." Therefore, while this is admittedly an imperfect solution, and without attempting to define what that "reasonable time" may be, we will continue to observe the *status quo*, at least for the present, in order to give Congress and the Treasury Department adequate time to develop permanent solutions. Thus, if an agency submits a duplicate check case to us under 31 U.S.C. § 82a-2, presumably pursuant to a charge-back agreement with Treasury, we will continue to treat it under that statute. We will also continue to apply 31 U.S.C. § 156 to those cases submitted by Treasury.

We emphasize that the absence of a charge-back agreement does not relieve an agency from its duty to cooperate with the Treasury Department in pursuing aggressive collection action to recover the duplicate payment.

Delegation of Authority Under 31 U.S.C. § 528

The Secretary of the Treasury is further authorized, by 31 U.S.C. § 528(h), to delegate the authority to issue replacement checks in whole or in part to the head of any other department or agency.

The Secretary of the Treasury has delegated the authority to issue replacement checks to the Secretary of Defense in limited circumstances. 31 C.F.R. § 245.8 (1981). Pertinent responsibilities and procedures as they relate to the Department of the Army are contained in Army Regulation (AR) 37-103. Army finance and accounting officers are authorized to issue replacement checks if the request by the payee is made within 15 days from the issue date of the original check for checks mailed to addressees in the continental United States, and within 30 days for checks mailed to overseas addressees, including Alaska and Hawaii. AR 37-103, para. 4-164.

Although this delegation introduces factual distinctions into some of the cases, we do not think it makes a difference in the way the losses should be treated. Even where the replacement check is issued by the Army, it is still paid by Treasury. The replacement check situation is different from other types of "improper payments" in that 31 U.S.C. § 528 requires Treasury to determine whether the first check has been paid before paying the second check. It is Treasury's failure to do this, or its payment on the second check notwithstanding prior payment of the first check, that results in the improper payment. Accordingly, our treatment of duplicate check cases will be the same regardless of which agency actually issues the replacement check since issuance of the replacement check is authorized in either event.

Having made the foregoing observations, we now proceed to the specific cases. As discussed above, since Army has accepted accountability for losses of this type, we will treat all of the cases under § 82a-2.

B-206589: Richard C. Mero

In the first case, to which we have assigned file designation B-206589, a check in the amount of $4,731.32 was issued to Richard C. Mero on June 16, 1980, representing civilian pay. Mr. Mero was stationed in West Germany. On July 1, 1980, Mr. Mero reported that he had not received the check. A replacement check was issued on July 17. Since Mr. Mero requested the replacement check within the time limit established by AR 37-103, the replacement check was issued by the Army. In December 1980, the Treasury Department notified the Army that Mr. Mero had negotiated both checks.

Army sought to recoup from Mr. Mero but attempts to locate him were unsuccessful. It appears that he had been removed from Government service for a variety of offenses such as falsification of travel vouchers, submission of a forged travel voucher, and unau-

thorized absence from duty, and that the check in question had been his final check.

The accountable officers are Lt. Col. A. T. Holder, former Finance and Accounting Officer, U.S. Army Missile Command, Redstone Arsenal, Alabama, and his successor, Lt. Col. G. D. Miller.

Based on our review of the record, we find that Army personnel followed applicable regulations, made reasonable collection efforts under the circumstances, and that there is no indication of bad faith or lack of due care on the part of any Army disbursing officer. Accordingly, relief is granted. Reasonable collection efforts, of course, should continue.

B-206579: Daniel Martinez

In the second case, a check in the amount of $645.88, representing military pay, was issued to Daniel Martinez on March 26, 1980. Mr. Martinez alleged non-receipt and a replacement check was issued on May 2 (by Treasury). Mr. Martinez subsequently negotiated both checks and the Army has been unable to locate him to obtain recoupment. The accountable officers are Lt. Col. D. I. Walter, former Finance and Accounting Officer, 4th Infantry Division and Fort Carson, Fort Carson, Colorado, and his successor, Lt. Col. D. H. Parrish.

As with the Mero case, our review of the record indicates that Army personnel followed applicable regulations and discloses no evidence of bad faith or lack of due care. While it appears that the Army could have done more to attempt to locate Mr. Martinez (see, *e.g.*, 4 C.F.R. § 104.2), in view of the relatively small amount of the shortage, and since further delay in submitting the relief request would have been undesirable in view of the 3-year statute of limitations (31 U.S.C. § 82i), we grant relief here also. As mentioned above, the granting of relief does not eliminate the agency's responsibility to continue reasonable collection efforts.

B-201286: David L. Thatcher

In this case, a check in the amount of $773, representing military pay, was issued to David L. Thatcher on April 29, 1977. Mr. Thatcher claimed non-receipt and Army issued a replacement check on May 2, 1977. Mr. Thatcher negotiated both checks. Alleging inability to locate Mr. Thatcher, Army requested relief for Lt. Col. P. G. Davies, former Finance and Accounting Officer, 9th Infantry Division and Fort Lewis, Fort Lewis, Washington, and his successor, Lt. Col. J. E. Rusk.

The time period involved in this case raises the issue of the applicability of the 3-year statute of limitations found in 31 U.S.C. § 82i. As noted, both checks were issued in 1977. However, the 3-year period did not begin to run until later. Treasury forwarded its Debit Voucher to the Army on November 1, 1978, and the shortage was reflected in the disbursing officer's Statement of Accountabil-

ity for November 1978. (See generally AR 37-103, Chapter 18.) As we have often pointed out, we consider the date of receipt by the agency of substantially complete accounts as the point from which the 3-year period begins to run. *E.g.,* B-198451.2, September 15, 1982. Thus, the 3-year period began to run when the Army Finance and Accounting Center received the disbursing officer's Statement of Accountability in November 1978. (Army would have no way of knowing that there was a loss for which anyone might be accountble until it received Treasury's Debit Voucher, the event which triggers inclusion on the Statement of Accountability.) Nevertheless, although Army submitted a timely relief request, the 3-year period has now elapsed, the accounts in question must now be regarded as settled, and there is no longer a need for us to grant relief. B-199542, November 7, 1980.

Having said this, two points merit further comment. First, we note that Army issued the replacement check only 3 days after the date of the original check. While we understand the Army's desire to accommodate its personnel, this in our view is not sufficient time to justify a determination that the original check was lost, stolen, or destroyed, when the sole basis for the determination is the payee's allegation of non-receipt.

Second, according to the record, the sole attempt to recover from Mr. Thatcher seems to have been one letter that was returned unclaimed. This in our view does not constitute diligent collection action. Had the statute of limitations not expired, we might be inclined to deny relief on these grounds. In any event, 31 U.S.C. § 82a-2(b) provides that the granting of relief does not relieve the department or agency from its responsibility to pursue collection action against the payee. Accordingly, we suggest that the Army resume efforts, within reason, to locate Mr. Thatcher. The Army might wish to pursue some of the devices specified in 4 C.F.R. §§ 104.2 and 102.6, many of which entail minimal administrative burden and expense.

B-201286: John M. Yarbrough

The fourth case, which we have included under file designation B-201286, is similar to the others. On November 30, 1975, the Army issued a check in the amount of $724.45 to John M. Yarbrough in payment of retired pay. Mr. Yarbrough alleged non-receipt, and a replacement check was issued on January 23, 1976. Both checks were negotiated. Mr. Yarbrough died on September 14, 1976. The accountable officers are Lt. Col. R. J. Withington, former Finance and Accounting Officer, Retired Pay Operations, Army Finance and Accounting Center, Indianapolis, Indiana, and his successor, Lt. Col. R. J. Hinton. (The replacement check here was issued by Treasury because it was not within the Army's delegated authority. The check represented retired pay, which is specifically exempted from the delegation. AR 37-103, para. 4-163c.)

Again, the passage of time raises a question under 31 U.S.C. § 82i, the statute of limitations. Although the replacement check was issued in January 1976, Army did not receive Treasury's debit voucher until January 1980, and the loss was reflected in the disbursing officer's Statement of Accountability for March 1980. Thus, we are well within the 3-year period (see discussion of Thatcher case above) and may proceed to the merits.

As with the other cases, we have no indication of bad faith or lack of due care and it appears that Army personnel followed applicable regulations. Thus, relief is proper unless we conclude that Army failed to diligently pursue collection action.

The Army's request for relief states that "Numerous attempts at collection from Mr. Yarbrough and also from his estate * * * have proved unsuccessful." The only collection attempt documented in the record submitted to us is a single letter sent to Mr. Yarbrough's surviving spouse on December 17, 1980, which was returned as undeliverable. Also, if we understand the matter correctly, it is not clear to us how Army could have attempted collection from Mr. Yarbrough himself since it presumably did not know about the duplicate payment until it received Treasury's debit voucher several years after he died.

While we again caution that diligent collection action generally requires more than a single letter, the circumstances here do not warrant denying relief. (The statutory authority for us to deny relief based on lack of diligent collection action is discretionary, not mandatory.) Mr. Yarbrough died in September 1976; Army received Treasury's debit voucher in early 1980. If Mr. Yarbrough left an estate subject to probate, barring unusual circumstances, the probate proceedings would most likely have been terminated before Army had the opportunity to file a claim against the estate. By the time Army learned of the shortage, it appears there was little Army could have done except to continue pursuing the widow. Considering these circumstances in relation to the amount of the loss, we will grant relief.

Problem Resulting From Title 31 Recodification

We have discovered one problem with the recodification of Title 31 which merits the attention of the Defense and Treasury Departments. The former 31 U.S.C. § 528 has become 31 U.S.C. § 3331 in the recodification (96 Stat. 955). Subsection (h) of the former § 528, which authorized the Secretary of the Treasury to delegate the authority to issue replacement checks to other Government departments or agencies or to Federal Reserve banks, is not included in the new 31 U.S.C. § 3331. A search of the Master Disposition Tables in the report accompanying the recodification reveals that the former subsection (h) was omitted. The reason given is that it is "Superseded by section 321 of the revised title that provides that the Secretary may delegate duties and powers to officers and em-

ployees of the Department of the Treasury." H.R. Rep. No. 97-651, Table 2A, page 298 (1982).

The new 31 U.S.C. § 321, as Table 2A indicates, authorizes the Secretary of the Treasury to delegate powers and duties *to other Treasury employees.* It does not authorize delegations to other agencies. Table 2A is thus incorrect in assuming that the new § 321 includes the former § 528(h). Therefore, while the results would certainly seem to have been unintended, the basis for the Secretary of the Treasury's delegation to the Secretary of Defense (31 C.F.R. § 245.8, discussed above) has been dropped from the statute. We have informally brought this to the attention of the Office of the Law Revisions Counsel, House of Representatives, and are bringing it to your attention (and will send a copy of this letter to the Treasury Department) in the event you wish to pursue the matter further.

[B-207629]

Contracts—Negotiation—Requests for Proposals—Cancellation—Reasonable Basis—Substantial Change in Specifications

A contracting officer in negotiated procurement need only establish a reasonable basis for cancellation of a solicitation after receipt of proposals; protest that such cancellation was improper is denied since record indicates increase in scope of work of about 46 percent was required.

Contracts—Negotiation—Requests for Proposals—Cancellation—Resolicitation Not Conducted—Arms Export Control Act Applicability

Protest that agency's failure to resolicit requirement after cancellation of initial solicitation is denied since procurement was conducted under Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, and foreign government on whose behalf procurement was conducted requested award be made to a specific source.

Foreign Governments—Defense Articles and Services—Arms Export Control Act—Foreign Military Sales Program—Competition Requirement Inapplicability—Sole-Source Award Requested

Protest that provisions in Defense Acquisition Regulation requiring contracting officer to honor request of a foreign government to sole-source procurement are unlawful because they violate requirement for competitive procurement in 10 U.S.C. 2304(a) is without merit because that provision is not applicable to foreign military sales procurements if the foreign government requests a sole-source procurement.

Matter of: Allied Repair Service, Inc., December 16, 1982:

Allied Repair Service, Inc. protests the cancellation by the Department of the Navy of request for proposals No. N626-78-82-R-0026, which called for proposals for the overhaul of a Royal Saudi Naval Forces ship. Allied also protests the failure of the Navy to resolicit the requirement competitively and its sole source award to

the Norfolk Shipbuilding & Drydock Corporation. The protest is denied.

The procurement was conducted under the authority of the Arms Export Control Act, 22 U.S.C. 2751 *et seq.* (1976), and was funded by the government of Saudi Arabia. Three proposals were received and neither Allied nor Norfolk submitted the offer with the lowest price. After preaward surveys were conducted on Allied and the low offeror, the Navy concluded that the specifications required changes which would increase the scope of work by approximately 46 percent and determined the changes were so substantial as to require cancellation of the solicitation under the authority of Defense Acquisition Regulation (DAR) § 3-805.4 (1976 ed.). It was further decided that the overhaul of two additional Saudi vessels should be combined with the first into one contract because the repairs required were similar. Thereafter, the Senior Representative, Royal Saudi Naval Forces, requested that overhaul of the three vessels be awarded to Norfolk on a sole-source basis. The contracting officer negotiated and awarded a sole-source contract to Norfolk for the overhaul of the three vessels pursuant to the Saudi request, under the authority of DAR § 6-1307(a), which provides that a Foreign Military Sales customer may request that a defense article or service be obtained from a particular source and that the contracting officer "shall honor" the request.

1. *The Cancellation*

The Navy contends that the cancellation was reasonable because the changes required an increase in the scope of work of about 46 percent on the first ship. We agree. In negotiated procurements, the contracting officer need only have a reasonable basis for cancellation as opposed to the "cogent and compelling" reason required for cancellation of advertised procurements. This distinction is based on the public exposure of competitive positions which occur as a result of the public opening of bids in advertised procurements—an event which does not occur in negotiated procurements. See *Management Services Incorporated,* B-197443, June 6, 1980, 80-1 CPD 394. In our view, a 46 percent change in its scope of work is a reasonable basis for cancellation.

Allied contends, however, that increases in the scope of work in ship repair contracts of 35-40 percent are considered normal and by general business standards are not unusual, and suggests that the changes here should have been handled through change orders after contract award. The "Changes" clause in Government contracts is designed to permit the agency and the contractor to modify the contract to reflect conditions which were not anticipated at the time of award. *Brumm Construction Company,* 61 Comp. Gen. 6 (1981), 81-2 CPD 280. However, a contracting officer may not award a contract under a specification knowing that the Government's needs are different from that identified in the specifica-

tion and that the specification must be changed after award. *Worldwide Direct Marketing,* B-200371, April 2, 1981, 81-1 CPD 253. We therefore find that the cancellation was proper.

2. *The Sole-Source Award*

Allied contends that the sole-source award to Norfolk is improper even if the cancellation of the original RFP was appropriate. Allied asserts that if the DAR authorized the Navy to award a sole-source contract in this case, the regulations are unlawful because they violate 10 U.S.C. 2304(a) which requires that procurements be competitive except in extraordinary circumstances where competition is not feasible, which it alleges is not the case here. We find no legal merit to this assertion.

The Department of Defense (DOD) acts as an agent for a foreign government when it conducts procurements under the authority of the Arms Export Control Act, using the foreign government's funds that have been deposited in the Foreign Military Sales Trust Fund Account in the Treasury. While the funds are appropriated in a technical sense, they are administered by the United States in the capacity of a trustee; by law, these funds can only be disbursed *in compliance with the term of the trust.* 31 U.S.C. § 1521 (formerly section 725s). DAR 6-1307(a), then, is no more than a reasonable implementation of the statutory requirement of 31 U.S.C. § 1521. For that reason, the legal framework for our review of these procurements is the DAR and not the procurement statutes that govern purchases made by the military departments on their own behalf using U.S. funds appropriated by the Congress for that purpose. See *Procurements Involving Foreign Military Sales,* 58 Comp. Gen. 81 (1978), 78-2 CPD 349, *Saudi Maintenance Company, Ltd.,* B-205021, June 8, 1982, 82-1 CPD 552.

Since the government of Saudi Arabia specifically requested the award of this contract to Norfolk, the contracting officer acted properly in negotiating the sole-source contract.

The protest is denied.

[B-209981]

Public Lands—Acquisition—Exchange Agreements—Bidding Rights—As Basis for State Payments Mineral Lands Leasing Act Requirements

Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt.

Rattlesnake National Recreation Area and Wilderness Act—Exchange Agreements—Bidding Rights—Retirement by Payment—Legality

Under proposed "Exchange Agreement" where Montana Power Company's total payment is in cash but it is accompanied by notice of use of bidding rights, Treasury would be required to pay Company for the amount of rights used pursuant to the notice. Reimbursement to Company is not proper absent authority to retire bidding rights by payment and lack of available appropriation for that purpose.

Rattlesnake National Recreation Area and Wilderness Act—Exchange Agreements—Bidding Rights—Value Limitation—Interest on Unused Rights—Legality

Proposed "Exchange Agreement" calls for increase bidding rights for Montana Power Company at 10 percent interest rate on outstanding unused bidding rights. Increase in value of bidding rights is not legally permissible since their value is limited to fair market value of lands under sec. 4(b)(2) of the Rattlesnake National Recreation Area and Wilderness Act, 16 U.S.C. 460*ll*-3(b)(2) (Supp. IV. 1980).

Matter of: Proposed Agreement for Exchange of Lands for Federal Coal Lease Bidding Rights, December 30, 1982:

We received a request from the Director of the Bureau of Land Management (BLM), Department of the Interior (Interior), for our opinion as to whether he has the authority to agree to a proposal from the Montana Power Company (Company) relating to the exchange of its lands to be included in the Rattlesnake National Recreation Area, and Rattlesnake Wilderness, Montana.

The request indicates that under the Rattlesnake National Recreation Area and Wilderness Act of 1980, lands owned by the Company have been appraised at approximately $17.5 million and that one acquisition method provided for in the Act is for the exchange of the lands for bidding rights in an amount equal to the lands' value. These rights may be used to pay the bonus or other payment required of the successful bidder for a competitive Federal coal lease. Under the proposed "Exchange Agreement" the Company would use the bidding rights for only half of any lease payment, assuring a 50 percent payment in cash. The cash payment would be remitted to the State of Montana as its 50 percent share of money received from sales, bonuses, royalties and rentals of Federal public lands under section 35 of the Mineral Lands Leasing Act of 1920 (MLLA).

In his submission the Director states as follows:

The Department's informal position, since adoption of regulations authorizing the creation and use of bidding rights in 1977 (43 C.F.R. Subpart 3526), has consistently been that only cash receipts are to be distributed by the Treasury to the various states under section 35 of the MLLA. Thus, a 50 percent portion of bonuses in competitive coal sales or royalties paid in cash would be subject to redistribution to the state where the lease is situated, however, any portion of the bid that would be satisfied by the bidder or lessee tendering a certificate of bidding rights would simply not be "money received" and thus would not be subject to distribution. We describe this position as informal since, at the time the Rattlesnake Act was passed, no Departmental regulation or written opinion so stated, and no bidding rights had then

been created or exercised to establish the precedent on their treatment under section 35 of the MLLA.

According to the Director, it appears that establishment of the proposed method of payment was to have been accomplished by a "Statement of Intent" signed by the Company, the Regional Forester of the United States Forest Service, Region I, and the Montana State Director of BLM. This statement was incorporated by reference in the Rattlesnake bill, but was deleted prior to its passage. The Director's tentative conclusion is that the statement has no effect on the disbursement of cash to be received from the Company because all mention of the statement was removed before the bill was enacted and furthermore, the statement is ambiguous regarding the 50 percent payment.

The Director further states that he will not agree to the proposal for distribution of revenues under section 35 of the MLLA absent our concurrence. Subsequent to the Director's submission, at a meeting with his staff, we were requested to also consider an additional method of payment contained in a later proposal dated December 2, 1982. Under it the Company would pay 100 percent in cash for Federal coal lease payments, from which the State of Montana would receive 50 percent and the Federal Treasury would reimburse the Company for its cash payment, cancelling a like amount of bidding rights. In addition, the Director's staff informally requested our views concerning the interest provision of the proposed Exchange Agreement which would entitle the Company to 10 percent interest on the value of the bidding rights during the time they were unused.

For the reasons discussed below, it is our opinion that the Treasury may not remit to the State of Montana an amount based on the Treasury's receipt of money from the Montana Power Company when half of the amount due to the United States is satisfied by the Company's use of bidding rights. Additionally, the Treasury is not authorized to retire the bidding rights by payment to the Company nor is there an appropriation available for this purpose. Finally, an increase in the value of bidding rights because of interest on outstanding bidding rights is not permissible since it would increase their value beyond the fair market value of the exchanged lands, which is not authorized by statutes.

LEGISLATIVE BACKGROUND

Section 35 of the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 191 (1976), provides in pertinent part that:

> All money received from sales, bonuses, royalties, and rentals of the public lands under the provisions of this chapter * * * shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury * * * to the State other than Alaska within the boundaries of which the leased lands or deposits are or were located; * * * 40 per centum thereof shall be paid into, reserved, appropriated, as part of the reclamation fund created by * * * the Reclamation Act, approved June 17, 1902, * * * All moneys received under the pro-

visions of this chapter * * * not otherwise disposed of by this section shall be credited to miscellaneous receipts.

The Rattlesnake National Recreation Area and Wilderness Act of 1980, Public Law No. 96-476, October 19, 1980, 94 Stat. 2271, 16 U.S.C. § 460*ll* (Supp. IV 1980), established the Rattlesnake National Recreation Area and Rattlesnake Wilderness Area. With regard to land acquisition and exchange, section 4 of the Act (16 U.S.C. § 460*ll*-3) provides in pertinent part as follows:

(a) Within the boundaries of the Rattlesnake National Recreation Area and Rattlesnake Wilderness, the Secretary is authorized and directed to acquire with donated or appropriated funds * * * by exchange, gift, or purchase, such non-Federal lands, interests, or any other property, in conformance with the provisions of this section. * * *

(b)(1) The Secretary of the Interior, in consultation with the Secretary of Agriculture, is authorized to consider and consummate an exchange with the owner of the private lands or interests therein within or contiguous to the boundaries of the Rattlesnake National Recreation Area and Rattlesnake Wilderness, * * * by which the Secretary of the Interior may accept conveyances of title to these private lands for the United States and in exchange issue bidding rights that may be exercised in competitive coal lease sales, or in coal lease modifications, or both, under sections 2 and 3 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. 201(a), 203).* * *

(2) The coal lease bidding rights to be issued may be exercised as payment of bonus or other payment required of the successful bidder for a competitive coal lease, or required of an applicant for a coal lease modification. The bidding rights shall equal the fair market value of the private lands or interests therein conveyed in exchange for their issuance. The use and exercise of the bidding rights shall be subject to the provisions of the Secretary of the Interior's regulations governing coal lease bidding rights, to the extent that they are not inconsistent with this Act, that are in effect at the time the bidding rights are issued.

(3) If for any reason, including but not limited to the failure of the Secretary of the Interior to offer for lease lands in the Montana portion of the Powder River Coal Production Region * * * or the failure of the holder of the bidding rights to submit a successful high bid for any such leases, any bidding rights issued in an exchange under this Act have not been exercised within three years from the date of enactment of this Act, the holder of the bidding rights may, at its election, use the outstanding bidding rights as a credit against any royalty, rental, or advance royalty payments owed to the United States on any Federal coal lease(s) it may then hold.

(4) It is the intent of Congress that the exchange of bidding rights for the private lands or interests therein authorized by this Act shall occur within three years of the date of enactment of this Act.

S. 3072, 96th Cong., 2d Sess. which was enacted as Public Law No. 96-476, was introduced by Senator John Melcher of Montana on August 26, 1980. At a hearing on S. 3072 held by the Subcommittee on Parks, Recreation, and Renewable Resources of the Committee on Energy and Natural Resources of the Senate on September 9, 1980 (96th Cong., 2d Sess. 21, 22), the Associate Director of BLM testified on section 4 of the bill. He indicated that Interior would support the bill if certain technical changes were made and if all reference to the statement of intent were deleted. He said that "Reference to an agreement that did not exist at this time was neither necessary or helpful." Additionally, he explained as follows:

Use of the bidding rights approach does nothing more than permit the Federal Government to obtain the private lands in question for a price to be paid in a medium other than cash. * * *

I must point out, however, that use of bidding rights would have an impact on the State of Montana or any other State where they are used. States are entitled to 50 percent of the receipts from Federal mineral leasing within their borders. To the extent that Montana Power applies its bidding rights to a coal lease sale or modification, or to other payments required of a lessee, cash receipts that the company would have paid for bonus bids, royalties or rentals, would be proportionately reduced and so will the State's share of those receipts.

In other words, if you are to protect the State's 50 percent of mineral leasing receipts, then you would have some language in there to do that.

The Senate Committee on Energy and Natural Resources favorably reported on S. 3072 with amendments, on September 25, 1980, S. Rep. No. 996, 96th Cong., 2d Sess. 1. Notwithstanding the Associate Director's comments, the bill as reported contained no additional provision regarding the State's share of receipts. It did include reference to the proposed statement of intent as follows: "In accordance with the agreement entitled "Statement of Intent" entered into by the Montana Power Company, the Regional Forester of the United States Forest Service, Region 1, and the State Director of the Bureau of Land Management, signed ———— 1980, * * *."

An Appendix to the Report contained a draft Statement of Intent signed only by the Montana Power Company. In the Appendix it was noted that the agreement was not in final form and was subject to change (Report, pages 7 & 8).

The bill as reported by The House Committee on Interior and Insular Affairs on September 17, 1980 (HR. Rep. No. 1340, 96th Cong., 2d Sess.) did not contain a similar provision, nor an appendix.

S. 3072 was considered by the Senate on October 1, 1980. Prior to its passage, Senator Melcher proposed an amendment which among other things (without explanation) deleted reference to the Statement of Intent. The amendment was agreed to by the Senate. 126 Cong. Rec. S 14206 (daily ed. October 1, 1980).

The next day the bill, as passed by the Senate, was considered by the House of Representatives. Prior to its approval Chairman Seiberling of the Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs inserted into the Congressional Record a "Statement of Intent" signed by all the parties, and dated October 2, 1980. The statement which differed from the draft appearing in the Senate Report reads in pertinent part as follows:

2 * * * (B) * * * Future royalty payments and rental may also be paid in cash or a combination of cash and bidding rights. All payments related to the Federal coal leases must include a minimum of 50 percent (½) cash. Cash portions of all receipts, up to 50 percent (½) of these [sic] total amount received by the Federal government, will be used to pay the State of Montana in accordance with the Mineral Leasing Act as amended. * * *

. . . . . .

4. In the event a land exchange cannot be mutually agreed to, or if only a portion of the Montana Power Company lands are included in the exchange, the Montana Power Company may, at its option, obtain a cash payment for all of, or the remainder of, its "Rattlesnake Lands" subject to appropriation by the United States Congress." 126 Cong. Rec. H 10345-6 (daily ed. October 2, 1980).

PROPOSED EXCHANGE AGREEMENT

We have been provided with an unapproved draft "Exchange Agreement" dated December 2, 1982, between the Company and the Secretaries of Agriculture and the Interior. This differs from the two Statements of Intent mentioned above, which were agreements in principle to be used as the basis for a binding agreement between the parties—the Exchange Agreement. Under the Exchange Agreement the Company would agree to deed to the United States its Rattlesnake lands and in exchange the United States, through Interior, would issue bidding rights to the Company. This would entitle it to receive credit for coal-related bonus and royalties in the amount of $17.5 million. The bidding rights would also allow a rate of interest of 10 percent per annum, compounded daily, so that the current value of the bidding rights could be obtained by the Company. The current value would be reduced by the amount of bidding rights value applied to lease payments. (Section 3.1 & .2.)

Section 3.4(b) provides that:

> Lease payments which make use of Bidding Rights shall be (i) in cash, in a minimum amount of fifty percent (50%) of the total debt then due, and the remaining amount shall be represented by a Bidding Rights Use Notice ("Notice") * * * or (ii) one hundred percent (100%) in cash, upon receipt of which along with a Notice, USDI shall authorize immediate reimbursement to Montana Power by the United States Treasury by certified check in the amount indicated as "Amount Applied to Bidding Rights" on the Notice; or (iii) one hundred percent (100%) by conveyance of a Notice instead of cash payment.

Section 3.4(e) provides that:

> The USDI, upon receiving a Notice, shall notify the United States Treasury by normal notice procedures of receipt of full payment so that payments to the states in which the leases are located may be made in the same manner and amount as if the United States Treasury had received one hundred percent (100%) of the Lease payment in cash without application of Bidding Rights.

ANALYSIS

We first consider the proposed Exchange Agreement's requirement that the Treasury remit to the State 50 percent of the total debt due to the United States for coal-related bonuses and royalties including that portion of the debt for which bidding rights have been utilized. We understand the provision to mean that if, for example, the Company must pay $1,000 bonus on a lease, it utilizes bidding rights worth $500 and pays $500 for the remainder. The State of Montana's share would be one-half of the $1,000 debt, $500.

Section 35 of the MLLA requires that "All money" received from sales, bonuses, royalties, and rentals of public lands under the Act shall be paid into the Treasury of the United States with 50 per centum thereof to be paid by the Secretary of the Treasury to the State where the lands or deposits are located. Under the Rattlesnake Area Act coal lease bidding rights equal to the fair market value of the lands to be included in the recreation area and wilder-

ness may be exchanged for the lands. These rights may be used in competitive coal lease sales or coal lease modifications as payment for bonuses or other required payments. To the extent they are not exercised within 3 years of the date of the Rattlesnake Area Act's enactment, the holder of the rights may use them as a credit against any royalty, rental or advance royalty payments owed to the United States on Federal coal leases it holds.

It appears clear that the bidding rights which may be accepted in certain specific situations in lieu of money are not themselves money. "Money" as used in the MLLA, section 35, is not defined, but appears to be employed in the commonly understood sense of a general medium of exchange—ordinarily legal tender coin or paper money. See definition of "money" in 58 C.J.S. 844 (1948) and Webster's Third New International Dictionary 1458 (Unabridged ed. 1981).

The bidding rights created by the Rattlesnake Area Act are for the special purpose of barter or exchange for certain lands, a form of payment not requiring the appropriation of funds with which the lands might otherwise be purchased. They may only be used in connection with the amount due to the Government incident to Federal coal leases, as specified in the Act. They cannot, for example, be used to pay the Company's Federal or State taxes, or other obligations. Bidding rights under the Act are, in short, substitutes for money, to be given to the Company for its land, to be used only as prescribed in the Act.

Under the Rattlesnake Area Act, bidding rights may be received by Interior in lieu of some or all monies to be paid by the holder of the rights in connection with Federal coal leases. However, since they are not money, the rights should then be retired by Interior. Only *money* received by Interior under section 35 of the MLLA would be forwarded to the Treasury for appropriate disposition, including payment of 50 percent of the money to the appropriate State. Absent specific statutory authority to do so, we are aware of no appropriate basis for payment to the State of Montana of any amount in excess of 50 percent of the money received by the Treasury. To do so would result in both the Reclamation Fund and the miscellaneous receipts account receiving less than their appropriate shares of money obtained under section 35.

The legislative history of the Rattlesnake Area Act indicates that a similar view was expressed by the Associate Director of BLM during a Senate hearing on the bill. He clearly stated that the effect of the use of the bidding rights would be to reduce the money received by the Treasury from which the State of Montana's 50 percent share would be disbursed. As a result, the State would not receive revenues amounting to one-half of the fair market value of the Company's lands. He indicated the need for a specific statutory provision to provide for payment to the State of 50 percent of the

total amount due to the Government, including bidding rights. However, this was not done.

We note that the Statement of Intent which appeared in the Appendix of the Senate Report was silent as to Montana's share of the bonuses, royalties, etc. for which the bidding rights would be substituted. The second Statement of Intent, signed by all parties and dated October 2, 1980, was inserted in the Congressional Record of that day prior to the House approval of the Rattlesnake Area bill. It contained a provision which arguably might require the Treasury to remit to the State of Montana payment for 50 percent of the total payment received by Interior. In any event, the legislation as enacted included no authority for the Treasury to remit to the State of Montana payments under section 35 of the MLLA representing what amounts to 50 percent of bidding rights received by Interior. Without this or similar provision, we are aware of no authority under which the Treasury might properly make payment under section 35 to the State of Montana for other than money actually received, notwithstanding the existence of the October 2, 1980 Statement of Intent signed before passage of the Act.

In summary, the proposed Exchange Agreement would require the Treasury to pay a State as if 100 percent of a lease payment had been received in cash, even though some part of the lease payment would be made in bidding rights. To this extent it is not in accord with current statutory authority, and therefore there is no available appropriation to pay out more than 50 percent of the cash received.

The Exchange Agreement also provides that where the Company's lease payment is entirely in cash, and is accompanied by a "Bidding Rights Use Notice," the Treasury shall reimburse the Montana Power Company for the amount stated in the notice. This would permit the State of Montana to receive 50 percent of the entire cash payment. However, the Treasury would have to disburse to the Company an amount equal to the bidding rights used at that time. The Treasury has no authority to retire bidding rights by payment, nor are we aware of an appropriation which would be available for this purpose. It follows that this provision is legally objectionable.

Finally, we consider the proposed Exchange Agreement's requirement (section 3.1 & .2) that the bidding rights be adjusted in value to reflect "a rate of interest growth of ten percent (10%) per annum, compounded daily." This would appear to be computed on the outstanding amount of unused bidding rights. The rationale for this procedure is that legal title to the lands would be deeded to the United States on execution of the Exchange Agreement but that it might take a number of years before all of the bidding rights were used. (Both in the Statement of Intent included in the Senate Report and the Statement of Intent dated October 2, 1980,

and signed by all parties, legal title would not be conveyed to the Federal Government until the total fair market value of the lands was received by the company.)

The Rattlesnake Area Act states that, "The bidding rights shall equal the fair market value of the private lands or interests therein conveyed in exchange for their issuance." (Sec. 4(b)(2)). Bidding rights not exercised within 3 years from the date of the law's enactment may be used as a credit against any royalty, rental or advance royalty payments on any Federal coal leases it may then hold. (Sec. 4(b)(3)). It is apparent from these provisions that the value of the bidding rights exchanged for the Company's lands may not exceed the fair market value of the lands. Upon establishment of the lands' fair market value at $17.5 million, that became the maximum value of bidding rights that could be provided to the Company, regardless of when the bidding rights are exercised. Provision was made for bidding rights not used within 3 years of passage of the Act. In that case, the use of the bidding rights is broadened to include credit against any royalties, rents or advance royalty payments due on Company-held coal leases.

There is no statutory provision for an increase in the amount of bidding rights because of delay in using them. To allow for an increase in the value of bidding rights in excess of the agreed fair market value of the lands as proposed in the Exchange Agreement before us would exceed the authority conferred by the Rattlesnake National Recreation Area and Wilderness Act. This would be so even if we were to view the 10 percent annual value increase as establishing a new or updated fair market value since there is no authority to increase it because of the passage of time. For the reasons stated, the increase in the value of bidding rights called for in the proposed Exchange Agreement is not legally permissible.

[B-209098]

Bids—Invitation for Bids—Amendments—Failure to Acknowledge—Wage Determination Changes—Union Agreement Effect

When union contract would require offeror to pay wages in excess of rates determined under Davis-Bacon Act, and acceptance of bid which failed to acknowledge amendment containing wage determination clearly has no prejudicial effect on competition, offeror may be permitted to cure defect by agreeing to amendment after bid opening.

Matter of: Brutoco Engineering & Construction, Inc., January 4, 1983:

Brutoco Engineering & Construction, Inc. protests award to anyone but itself under Invitation for Bids (IFB) N62474-82-B-0244 issued by the Naval Air Station, Alameda, California. The solicitation requested bids to repair concrete aprons at the Naval Air Station. The Navy rejected Brutoco's bid as nonresponsive because it failed to acknowledge amendment 1 containing a revised wage determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1976) (the Act).

Brutoco recognizes that its bid was defective in failing to acknowledge the amendment, but Brutoco maintains that the defect should be waived. Brutoco points out that it bid $1,399,600, compared with $1,494,843 bid by the next low offeror. Brutoco asserts that it did not receive a copy of the amendment.

According to Brutoco, the only class of labor affected by the amendment is cement masons; the difference in the minimum wage rate for this labor classification in the original determination and in the amendment is $1.15 per hour; and the total difference in cost for the entire contract is less than $800.00.[1] Brutoco asserts that it is obligated to pay a wage rate in excess of the minimum shown on the wage rate amendment because of its union agreement.

The issue as we view it is twofold—(1) whether Brutoco obtained any actual or theoretical competitive advantage as a result of its failure to acknowlege the amendment, thus adversely affecting the competitive bid system; and (2) whether there would be an adverse effect on the interests protected by the Act. We are of the opinion that under the circumstances of this case, neither the competitive bid system nor the Act will be subverted by an award to Brutoco.

We have, in limited circumstances, permitted a bidder to cure a defect in an otherwise responsive bid. For example, where an invitation requires a price on every item in a solicitation, a bid that does not contain a price for an item is generally considered to be nonresponsive and must be rejected. This is so because the bidder is not legally obligated to perform the work represented by the

[1] About .8 percent of the $95,213 difference between Brutoco's bid and that of the second low bidder. There is no evidence on the record to rebut these assertions.

missing price. We have, nonetheless, permitted correction of such a bid where the bid not only indicates the *possibility* of the error, but also its exact nature and the price involved. This exception to the general rule is premised on the theory that where the consistency of the pricing pattern on the bid establishes the error and the price, to hold the bid nonresponsive would convert an obvious clerical error of omission to a matter of responsiveness. E.g., *Selland Construction, Inc.*, B-201701.2, May 19, 1981, 81-1 CPD 383.

The procurement regulations also recognize, and we have permitted, the waiver of a bid's technical nonresponsiveness where it was shown that the deviation did not have any relative impact on bid prices because its effect was *de minimus*. See *Roarda, Inc.*, B-192443, November 22, 1978, 78-2 CPD 359. In *Roarda*, we considered the possible impact of price to the Government of .1 percent of the low bidder's total price and 4 percent of the difference between the low and the second lowest bid to be so insignificant as to permit the waiver of the deviation as a minor informality.

When we view the facts of this case in relation to the factors discussed above, we conclude that, at least insofar as the effect on the competitive bid system is concerned, Brutoco's failure to acknowledge the amendment cannot reasonably be construed to affect the competition such that the competitive bid system will be adversely affected if the firm is permitted now to cure the defect by acknowledging the amendment.

However, we also recognize that the Act's principal purpose is to protect a contractor's employees from substandard earnings by fixing a floor under wages on Government projects. *United States* v. *Binghamton Construction Co., Inc.*, 347 U.S. 171 (1953). For that reason, we have always held that the failure to acknowledge a wage rate determination is a material deviation that cannot be waived because the absence of such an acknowledgement would not legally obligate the bidder to pay the specified wages to its employees. *Air Services Company*, B-204532, September 22, 1981, 81-2 CPD 240.

Yet, there are circumstances as a practical matter where the rights of these employees are protected—not by any act of the Government—but through the contractual relationsip of the employees' union and the employer/bidder. Thus, where it can be shown that the employees in question are in fact covered by a contract that legally binds the employer/bidder to pay wages not less than the Secretary of Labor's minimum wage rate determination, we think that the employees have been protected from the evils the Act was designed to foreclose. Because of its legal obligation under a union contract, we do not see how a bidder could refuse to acknowledge a wage rate determination after bid opening by claiming it did not intend to pay the wages set forth in it. Thus, the employer/bidder's ability to disavow its bid on the basis of the wage rate determination alone is so remote that it can be disregarded.

We also recognize that there are other administrative factors involved in the protection of the employees' right to adequate payment, such as the right of the Government to withhold payments to the contractor to the extent necessary to pay the employees the difference between the wages actually paid and those required by the determination. 40 U.S.C. § 276a.

For that reason, we believe the wage rate determination must be acknowleged prior to award, to afford the full panoply of protection contemplated by the Act.

We think, then, that under the circumstances of this case, the failure to acknowledge the amendment is immaterial and that Brutoco should be permitted to cure the technical deficiency in its bid by acknowledging the amendment.

The protest is sustained.

[B-207777]

Foreign Governments—Contracts With United States—Canadian Commercial Corporation—Endorsement of Canadian Bid/Offer

Canadian Commerical Corporation, a corporation of the Government of Canada, is required to submit an unequivocal endorsement of Canadian producer's bid. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases are modified in part.

Contracts—Payments—Progress—Request—What Constitutes—Canadian Bids

Requests for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire.

Matter of: Canadian Commercial Corporation, January 7, 1983:

The Canadian Commercial Corporation (CCC) protests the rejection of a bid submitted by Canada Cordage, Inc., a Canadian producer, to the Defense Industrial Supply Center (DISC), Defense Logistics Agency (DLA), in response to invitation for bids (IFB) No. DLA500-82-2315.

CCC's endorsement of Canada Cordage's bid contained a request for progress payments which DLA construed as imposing a condition that rendered Canada Cordage's bid nonresponsive. CCC contends it did not condition the bid on the receipt of progress payments but merely requested that they be provided if they were available. CCC furthermore contends that its requests cannot be construed as a condition because of CCC's status as an endorser of bids submitted by Canadian producers under Defense Acquisition Regulation (DAR) § 6-501 *et seq.* (Defense Acquisition Circular No. 76-25, October 31, 1980), which sets forth an agreement between the United States and Canada.

The protest is sustained.

CCC is wholly owned by the Government of Canada. It was established in 1946 in order to, among other things, assist in the development of trade between Canada and other nations. CCC provides a variety of services to the Department of Defense (DOD) and acts as the prime contractor on any bid endorsed by CCC or submitted through it to DOD and subcontracts 100 percent of the contract to the Canadian firm submitting the bid. See *Baganoff Associates, Inc.*, 54 Comp. Gen. 44 (1974), 74-2 CPD 56.

Canada Cordage's bid the CCC's endorsement were submitted in accordance with DAR § 6-504.1(b)(2) which provides:

> When a Canadian bid or proposal cannot be processed through the Canadian Commerical Corporation in time to meet the bid opening requirement, the Corporation is authorized to permit Canadian firms to submit bids or proposals directly, *provided* the Canadian bid or proposal and the Canadian Commerical Corporation endorsement are both received by the purchasing office prior to bid opening. [Italic in original.]

See generally, *Ronald Campbell Company*, B-190773, April 17, 1978, 78-1 CPD 296; *Canadian Commerical Corporation*, B-185816, June 21, 1976, 76-1 CPD 396. CCC's endorsement was contained in the following telex to DLA:

> Bid by: Canada Cordage Inc., Kitchener, Ontario, Canada is hereby endorsed (DAR 6-504.1(b)(2)). Duty not to be included for evaluation (DAR 6-1403.1(c)(4)). Double asterisk prime contract with CDN Commercial Corporation, Ottawa, Ontario K1A 0S6. (DAR 6-1406.1(a)). For information: F St Germain A/C 819 944-3314 CCC File No. 70K3-82-B-2315(FS) refers. Double asterisk progress payments, in accordance with governing US procurement regulation, are requested.

The bid was rejected on the basis of DISC Master Solicitation, Clause L-19, "Progress Payments" (DISC 1970 FEB), which was incorporated by reference into the IFB. Clause L-19 implements DAR Appendix E § 504.5. The clause provides:

> *PROGRESS PAYMENTS* (DISC 1970 FEB)
>
> (a) Advertised Procurement: Unless specifically provided for in the Schedule of this Solicitation, progress payments will not be made in connection with this procurement and progress payment clauses will not be included in the contract at the time of award. *Offers conditioned upon provision for progress payments, when such payments are not authorized in the schedule of the Solicitation, will be rejected as nonresponsive.* [Italic supplied.]

DLA construed CCC's request for progress payments as a condition of Canada Cordage's bid which rendered it nonresponsive.

Our Office has held that a bid conditioned on the receipt of progress payments where they are not allowed by the solicitation is nonresponsive in a material respect because it modifies the legal obligations of the parties concerning payments contrary to the express terms of the solicitation. 46 Comp. Gen. 368 (1966).

DLA relies on 46 Comp. Gen. 368 (1966), and 45 *id.* 809 (1966), for the rejection of the Canada Cordage bid. In 46 Comp. Gen. 368, the bidder included the following statement:

In the event Lockheed Electronics Company is awarded a contract resulting from the subject IFB, it is requested that a suitable clause for progress payments to be included therein.

In the 45 Comp. Gen. 809 case, the bidder included in the bid section entitled "Supplies or Services & Prices" the words "Progress Payments Are Requested." In both cases we held that the statements imposed conditions that rendered the bids nonresponsive. Both cases relied on B-154755, September 23, 1964, in which we stated:

While we would agree that in the ordinary sense the word "request" is precatory in nature, *its precise meaning must depend upon the existing circumstances.* * * * Since the invitation provided for a method of payment we think it not unreasonable to view your request as something more than a mere wish or desire. Had your bid been accepted it could have been argued that the Government accepted your request for progress payments and was bound to make payment in accordance therewith. If, as suggested, your request was in the nature of mere hope or wish and you intended to accept a contract subject to the "Payments" article, it was incumbent upon you to clearly express such intention. * * * It is a rule of long standing that where two possible meanings can be reached from the terms of a bid a bidder may not be permitted to explain what he intended since he would then be in a position to affect the responsiveness of his bid. * * * [Italic supplied.]

CCC argues that the present case is more analogous to *Potomac Iron Works, Inc.,* B-200075, January 8, 1981, 81-1 CPD 15, in which a bidder included the following advance payment request in its bid:

Due to nature and supply of specified alloy, advance payment request in the amount of $1,800 each *to secure supply.* Advance payment liquidated in 1 month or less. All *in accordance with* App. E of DAR. * * * [Italic supplied.]

The procuring agency determined that the request conditioned the bid because it demonstrated that the protester could not secure supply without advance payment. We disagreed:

In our view, Potomac's statement requesting advance payments "to secure supply" in accordance with Appendix E of DAR can reasonably be interpreted only to mean that Potomac was "requesting" advance payments and was not in any way conditioning or qualifying its bid. DAR E-407 permits bidders to request advance payments and there is nothing in Potomac's bid which indicates that it could not obtain the necessary materials in the absence of advance payments. Therefore the rejection of Potomac's bid as nonresponsive was improper and its protest is sustained. * * *

CCC argues that the language contained in its request is virtually identical to the "in accordance with App. E of DAR" language approved in *Potomac,* and is actually clearer because it does not contain the accompanying "to secure supply" language.

Our Office has held that the failure of CCC to submit, prior to bid opening, an endorsement of a bid submitted by a Canadian producer renders the bid nonresponsive. *Ronald Campbell Company, supra; Canadian Commerical Corporation, supra.* In our view, the endorsement must also be unequivocal. If the endorsement contains a condition that the endorsement is valid only if progress payments are to be paid, the bid is nonresponsive.

The word "request" is in the ordinary sense precatory in nature. B-154755, *supra.* CCC's request for progress payments therefore does not render Canada Cordage's bid nonresponsive unless the ex-

isting circumstances indicate that the "request" may have been something more than a mere wish or desire. *Id.* In our view, CCC's request "in accordance with governing U.S. regulations" can reasonably be interpreted only to mean that CCC was "requesting" progress payments and was not in any way conditioning its endorsement. Moreover, we agree with CCC that its request is even clearer than the request involved in *Potomac* because CCC's request did not contain the "to secure supply" language involved in *Potomac.* We conclude that CCC's endorsement did not render Canada Cordage's bid nonresponsive.

We recognize that the facts of this case are similar to 47 Comp. Gen. 496 (1968), 46 *id*, 368, *supra,* and 45 *id*, 809, *supra,* in which we reached a contrary conclusion. However, the rule applied in those cases, that is, whether the "request" is a condition or mere wish or desire, is identical to the rule applied in this case and *Potomac.* To the extent that our application of the rule in those cases may be inconsistent with our descision in this case, those cases should not be followed.

Because we have sustained the protest, we need not consider other issues raised by CCC.

The protest is sustained.

[B-197765]

Agriculture Department—Farmers Home Administration—Loans—Natural Disaster Emergency Loans—Eligibility—Consolidated Farm and Rural Development Act

It is concluded that Farmers Home Administration (FmHA) practice of determining eligibility for natural disaster emergency loans, authorized under 7 U.S.C. 1961 *et seq.*, on county-wide rather than individual crop losses, is unlawful. Legislative history of amendment to 7 U.S.C. 1961, in which area designation requirement was abolished, Pub. L. 95-334, sec. 118, 92 Stat. 426 (Aug. 4, 1978), clearly indicates that Congress intended that programs be made available to farmers on a case-by-case basis. Furthermore, the Secretary of Agriculture has an affirmative duty to make the programs available to potential farm borrowers, and since under current guidelines, farm borrowers, in counties in which more than 25 farmers are affected by disaster, cannot apply for loans unless county-wide crop losses exceed 30 percent, FmHA's conduct of program is contrary to law.

To The Honorable Thomas F. Eagleton, Committee on Appropriations, United States Senate, January 10 1983:

This responds to your letter dated May 25, 1982, requesting our opinion on whether the Farmers Home Administration (Administration) has been unlawfully limiting the availability of natural disaster emergency loans authorized under the Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1013a, 1921 *et seq.* (1976) (Act)). In your view, the Administration's practice of basing loan eligibility on county-wide, rather than individual, crop losses the Act. You asked us to review the loan program's authorizing legislation and advise you as to the legality of the Administration's prac-

tice. As explained below, we agree that the Administration is conducting the program in a manner which is inconsistent with Congressional intent and in violation of the Act.

You are concerned that the Administration may be administering the loan program contrary to the letter and intent of the provisions of its authorizing legislation, 7 U.S.C. §§ 1961 *et seq.* (1976). Generally, under the program, the Secretary of Agriculture makes and insures loans to establish farmers, ranchers, or persons engaged in aquaculture (or United States businesses engaged primarily in farming, ranching or aquaculture) who have suffered production losses as a result of having been affected by a natural disaster or by a major disaster or emergency designated by the President. 7 U.S.C. § 1961(a).

7 U.S.C. § 1970, provides that:

> [t]he Secretary shall make financial assistance under this subchapter available to any applicant seeking assistance based on production losses if the applicant shows that a single enterprise which constitutes a basic part of the applicants' farming, ranching, or aquaculture operation has sustained at least a 30 per centum loss of normal per acre or per animal production cr such lesser per centum of loss as the Secretary may determine as amended by Pub. L. 97-35 § 163, approved August 13, 1981, 95 Stat 378, as a result of a disaster * * *.

Your understanding is that the Administration denies individual farmers emergency loans unless county-wide losses exceed 30 percent of normal production in cases where more than 25 farmers have been affected by a disaster. (If fewer than 25 farmers sustain losses, applications for assistance are considered by Agriculture on an individual basis.)

In your view, 7 U.S.C. § 1970 directs the Secretary to consider each farmer's crop reduction individually when determining if the 30 percent production loss eligibility requirement has been met in cases where more than 25 farmers are affected. Any applicant meeting the 30 percent test should be considered for a loan regardless of the percentage of crop loss of others in his county, under your reading of section 1970. The Administration's practice, however, prevents individual farmers from applying for loans where more than 25 farmers in a county are affected even though they have suffered a 30 percent crop reduction if county-wide losses do not average 30 percent.

Upon receiving your inquiry, we asked the Secretary of Agriculture for his comments on the issues you raise. His response indicates that your understanding of the administration's practice is essentially correct, although the Department describes it in a slightly different way. The Administration's procedure when a natural disaster occurs is to determine whether a county has suffered a 30 percent loss, and if so the Secretary designates it as a disaster relief area. Upon such designation, the farmers within the county may apply for loans individually. However, farmers not in a designated county may not receive assistance, unless there are fewer than 25 farms in the county which have suffered a 30 percent loss.

The area designation procedure is prescribed by regulation. 7 CFR § 1945.20 (1982). A guideline established by the Secretary sets forth the requirements that a designation be made on the basis of county-wide losses.

The Secretary's position is that determination of loan eligibility on a county-wide basis is not contrary to the Consolidated Farm and Rural Development Act. In his view, the Act gives the Secretary sufficient discretion in administering the emergency loan program to allow the Department to use the county designation procedure. 7 U.S.C. § 1961, which provides the Secretary the general authority to conduct the program, states in pertinent part:

> The Secretary shall make and insure loans under this subchapter * * * to (1) establish farmers, ranchers, or persons engaged in aquaculture * * * where the Secretary finds that the applicants' farming, ranching, or aquaculture operations have been substantially affected by a natural disaster in the United States * * *.

We recognize that under the statute the Secretary is accorded a degree of latitude in administering the emergency loan program. However, the Secretary does not have the discretion to establish a procedure, such as making an area designation based on county-wide losses, which systematically excludes those farmers which the Congress intended the program to benefit.

The legislative history of section 1961 indicates that Congress does not intend that the Administration follow an area designation procedure in conducting the natural disaster emergency loan program. Before amendment in 1978, section 1961 specified that the Secretary was required to designate emergency areas and make loans in such areas if he found that a natural disaster had occurred in that area which had substantially affected farming. However, in 1978, Congress amended section 1961 by deleting the area designation requirement. (Public Law No. 95-334, § 118, 92 Stat. 426 approved August 4, 1978). Congress altered section 1961's language to its current form, quoted above. The provision deleting the requirement was a Senate floor amendment to the Senate's version of the bill which was later enacted as the Agriculture Credit Assistance Act of 1978. Senator Allen, Chairman of the Subcommittee on Agriculture Credit and Rural Electrification, offered the amendment, apparently on the recommendation of the Farmers Home Administration. 124 Cong. Rec. S 12139 (Daily ed. May 2, 1978) (remarks of Sen. Allen). He explained the amendment's purpose as follows:

> The purpose of this amendment, which contains all the present provisions in section 114, is to give the Secretary of Agriculture greater discretion in making available emergency loans. It will permit the Secretary to adopt revised procedures that would make emergency loans more readily available to farmers, ranchers, and aquaculture operators after the occurrence of a natural disaster, therefore making assistance available to disaster victims on a more timely basis. *id.* at S 12139

The explanation of the Conference Committee Chairman, Senator Talmadge, during the Senate's consideration of the conference report also indicates that Congress intended that the Administra-

tion determine disaster loan eligibility on an individual basis. Senator Talmadge said:

> In the past, the emergency loan program could not be put into effect without going through the process of having an entire county declared a disaster, under this bill, the emergency program administered by the Farmers Home Administration can be made available to individual farmers on a case-by-case basis. This is a significant improvement over the existing law. 124 Cong. Rec. S 21996 (daily ed. July 20, 1978) (remarks of Senator Talmadge).

Further, Representative Jones, chairman of the House of Representatives Agriculture Committee's Subcommittee on Conservation and Credit, during the House of Representative's consideration of the conference report stated:

> Another change which should go a long way to reducing frustrations of farmers and their Congressmen is natural disaster situations. One of the first actions I took as chairman of the Subcommittee on Conservation and Credit was to hold hearings on our emergency programs especially as they were operating under the drought conditions. This bill makes some changes in the FmHA disaster loan program which will make it operate much more effectively.
>
> The secretarial emergency designation would no longer be required in order to make disaster loans to farmers. Instead emergency loans would be made when the applicant's farming, ranching, or aquaculture operations have been substantially affected by a natural disaster in the United States or by a major disaster. I feel this simplified procedures will end a lot of the problems with this program. 124 Cong. Rec. H21752 (daily ed. July 20, 1978) (remarks of Rep. Jones).

For other portions of the legislative history of section 1961 which indicate that Congress intended that the Secretary administer the program on an individual basis, see 124 Cong. Rec. H 21749 (daily ed. July 19, 1978) (remarks of Rep. Foley); 124 Cong. Rec. S 21998 (daily ed. July 20, 1978) (staff summary of conference substitute); and the Joint Explanatory Statement of the Committee of Conference, reprinted in the U.S. Code Cong. and Admin. News at 1185, 1186 (1978).

The cited legislative history shows that Congress believed that the disaster loan program would operate more effectively if the area designation requirement was abolished. Accordingly, in light of the legislative history discussed above, it is clear that Congress intended that the Administration stop following the area designation procedure and begin determining disaster loan eligibility on a case-by-case basis after the 1978 amendment to 7 U.S.C. § 1961.

The Secretary contends that notwithstanding this legislative history, the Act gives him sufficient discretion to continue to use the county designation procedure. He reads 7 U.S.C. § 1961 as setting forth the basic eligibility criteria for emergency loans. He contends that 7 U.S.C. § 1989, which authorizes him to make regulations and to prescribe conditions for making loans, permits him to "issue regulations necessary to define a natural disaster along with establishing guidelines as to the manner of determining whether or not an area is substantially affected by such a natural disaster." The Secretary also acknowledges that under his interpretation of 7 U.S.C. § 1989 he has the discretion to make loans available to individual farmers. He informs us, however, that the Department has con-

cluded that the continued use of the county designation process is necessary for "administrative convenience."

The provisions of 7 U.S.C. § 1961 are mandatory, not permissive; the Secretary may not ignore the section's directives. In *Berends* v. *Butz,* 357 F. Supp. 143, 150 (1973), the Secretary of Agriculture made a similar argument to justify terminating an emergency loan program under the previous version of this Act. The United States District Court for the District of Minnesota stated:

> "Shall" is mandatory language • • • The language in the statutes and regulations relied on by plaintiffs is not of a permissive nature, but affirmatively directs defendants to perform. Whereas the Secretary may have a great deal of discretion in the administration of emergency loans, he has no license to act in violation of mandatory language of statutory laws or agency regulations. *id.* at 150.

See also *Dubrow* v. *Small Business Administration,* 345 F. Supp. 4 (D. Cal. 1972) where the right to apply for Small Business Administration disaster loans was at issue. The Government contended that under the Disaster Relief Act of 1972, the agency had absolute discretion to determine whether or not to make a loan. The Court stated:

> Whatever the limits on this Court's authority to review denial of an application, they do not preclude judicial review when the SBA has refused to follow its statutory duty to determine whether the loan to a given applicant is necessary or appropriate. *id.* at 8, 9.

Accordingly, as subsection (a) states, if the Secretary finds that an applicant's farming operations, as opposed to designated areas, have been substantially affected by a natural disaster, he must make or insure a loan in accordance with the program's authorizing provisions (assuming available funds and that the Secretary determines that the applicant is otherwise eligible.) He may not conduct the program under a policy which systematically excludes individual farmers made eligible for loans by the statute.

In our view, the Secretary's County designation policy could operate to frustrate the Act's clear mandate that all qualified farmers who have suffered the requisite minimum loss of 30 per cent be eligible for a disaster loan. However, the Secretary's policy would arbitrarily exclude from consideration, regardless of the extent of his loss, a farmer who happens to live in a county where at least 25 of his fellow farmers are affected by a natural disaster but where the average loss, county-wide, fell a little short of 30 per cent.

The guideline the Secretary uses to determine what constitutes a substantial loss is set forth in the 1982 Emergency Operations Handbook for USDA State and County Emergency Boards. Under the guideline, a substantial loss is defined as, "at least 30 percent dollar loss to all cash crops grown in the County during the disaster year." Conceivably, there may be counties where a natural disaster has affected more than 25 farmers, but the county-wide production loss is under 30 percent. Farmers who have suffered individual losses greater than the 30 percent prescribed by 7 U.S.C. § 1970 would thus be automatically precluded from applying for

loans. A farmer residing in a designated county who has suffered a 30 percent loss could get a loan, while his neighbor residing in a non-designated county, who has suffered a much greater loss could not apply for assistance because the losses in his county, suffered by more than 25 farmers, did not meet the Secretary's guideline.

Accordingly, in our opinion, the Secretary's guideline which provides in effect that he make his determination to accept applications on whether more than 25 farmers have suffered substantial losses based upon county-wide losses is inconsistent with the legal requirement that he make the program available to all who may qualify. The deficiency could be cured, among other ways, if his policy was to make designations in counties where he found that more than 25 farmers had suffered at least a 30 percent loss instead of requiring a county-wide loss of 30 percent. In that way the program would be available to all farmers—by county designation in counties where more than 25 farmers have been affected by a natural disaster, and by FmHA State Director authorization in counties where 25 or fewer farmers have been affected.

[B-206339]

Checks—Payees—Deceased—Heirs' Claim—Fact of Possession—Insufficient to Support Payment

Claimants assert entitlement to proceeds of 13 Treasury checks issued in 1936 and 1937. Original payee died in 1954. Payee had indorsed one check incident to unsuccessful attempt to negotiate it in 1939, but other 12 were unindorsed. Checks were found among personal effects of payee's nephew, who was not a legatee under payee's will and who died in 1979. Claimants are heirs of nephew. Mere fact of possession does not establish *inter vivos* gift or other basis of entitlement, and record contains no evidence of delivery of checks by payee to nephew. Therefore, General Accounting Office finds no basis to allow claim, under either Uniform Commercial Code or relevant state law.

Matter of: Estate of William A. Sixbury—Claim for Proceeds of Unpaid Treasury Checks, January 17, 1983:

This is a claim for the proceeds of 13 Treasury checks issued in 1936 and 1937. The claimants allege that the checks were a gift from the payee to his nephew and that the nephew subsequently died and left the checks to them. The matter has been referred to our Office by the Department of the Treasury pursuant to 31 U.S.C. § 3328(a)(1) (formerly 31 U.S.C. § 132(a)), which provides that where a doubtful question of law or fact exists regarding the presentation of a United States Treasury check for payment, "the Secretary [of the Treasury] shall defer payment until the Comptroller General settles the question." The doubtful question in this matter is whether the named payee transferred or delivered the checks to his nephew with intent to make a gift, or whether the facts of this case are otherwise legally adequate to permit payment. We conclude that there is insufficient evidence to allow payment of the proceeds to these claimants.

Between June 1936 and August 1937, the Treasury Department issued 13 Treasury checks totalling $18,828.97 to George T. Howeth, a gold dealer in Syracuse, New York. Each check bore the notation that it was issued for "bullion." Except for one unsuccessful attempt by Mr. Howeth to cash one of the checks in 1939, no claim was made on any of the checks until February 1980, when the Treasury Department was informed that the checks (12 of which were not indorsed by Mr. Howeth) had been found among the personal effects of a Mr. William A. Sixbury, of Syracuse, New York, who was the nephew of Mr. Howeth, but not a legatee under Mr. Howeth's will. Mr. Sixbury died in 1979. The claimants in the case, Harry J. Snyder and Mary Snyder, are the residuary legatees of Mr. Sixbury's estate.

Few facts are known beyond those stated above. Mr. Howeth did not mention the checks in his will. His entire estate was left to his wife, Lucy Howeth, who died in 1956. She in turn left her estate to her brother, Harry J. McCarthy, Sr., who died in 1963. Mr. McCarthy's estate, with the exception of one specific bequest to his son, Harry, Jr., was left to his wife Agnes F. McCarthy.

The will of Mr. Sixbury similarly does not mention the checks or how he gained possession of them.

The claimants have argued that the checks must have been a gift from Mr. Howeth to Mr. Sixbury. However, they have presented no evidence of this. Both Mr. Sixbury and Mr. Howeth are dead, and the residual heirs of Mr. Howeth, Agnes McCarthy and Harry McCarthy, Jr., have not been located. Thus, there is no way for us to ascertain how Mr. Sixbury gained possession of the Treasury checks which were payable to Mr. Howeth.

Analysis

Federal law rather than state law governs the rights and duties of the United States on commercial paper that it issues. To hold otherwise would cause an undue diversity in results "by making identical transactions subject to the vagaries of the laws of the several states." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1942). More specifically, our Office has held that the Government should follow the Uniform Commercial Code (UCC) "to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions." 51 Comp. Gen. 668, 670 (1972).

Under the UCC, the rights of a person in possession of an instrument depend largely on whether that person qualifies as a "holder." If the person is a "holder," he may negotiate the instrument and enforce payment in his own name. UCC § 3-301. Mere production of the instrument is sufficient, and a party asserting a defense has the burden of proving it. UCC § 3-307 and Comment 1 thereto.

With respect to an "order" instrument (all of the checks in question are order instruments), status as a holder requires both delivery and indorsement. UCC § 3-202. Without indorsement, a transferee of an order instrument is not a holder. See UCC § 3-201, Comment 8. Mere possession of the instrument does not suffice. With respect to the 12 unindorsed checks, therefore, Mr. Sixbury could not be viewed as a "holder," nor can his heirs. Without the status and rights of a holder, the "person in possession of an instrument must prove his right to it and account for the absence of any necessary indorsement." UCC § 3-307, Comment 2. See also UCC § 3-201, Comment 8. Since there is no indorsement and no evidence of delivery by Mr. Howeth to Mr. Sixbury, the UCC would appear to preclude recovery.

With respect to the one check that was indorsed by Mr. Howeth, claimants argue that Mr. Sixbury became a holder and that the executors of his estate acquired this status. However, the record shows that the indorsement was incident to an attempt by Mr. Howeth to negotiate the check, and not to any transfer of the check to Mr. Sixbury. The check in question was dated September 14, 1936. Mr. Howeth indorsed it pursuant to an attempt to negotiate it in January 1939. Under the law in effect at that time, Government checks generally had to be negotiated by the end of the fiscal year following the fiscal year in which they were issued. 31 U.S.C. § 725t (1934 ed.). After that time, negotiation required settlement by the General Accounting Office and the issuance of a substitute check.[1] The check in question was returned to Mr. Howeth unpaid because he had exceeded the time limit, and he apparently made no further attempts (nor did Mr. Sixbury) to negotiate it or any of the other 12 checks. Thus, the record contradicts any inference that the indorsement on the September 14 check bore any relationship to a transfer to Mr. Sixbury. As with the other 12 checks, there is no evidence of delivery and therefore no basis for recovery.

Claimants in this case can recover only if the mere fact of possession is sufficient to establish an entitlement or perhaps to create the presumption of a gift. As seen above, the UCC does not provide the basis for recovery.

To determine whether the checks in Mr. Sixbury's possession were a gift, we also turned to New York law for guidance. Under New York law, the essential elements of an *inter vivos* gift are (1) delivery of the property by the donor to the donee, (2) intent to pass title, and (3) acceptance by the donee. See *First National Bank of Lockhaven* v. *Fitzpatrick,* 289 N.Y.S. 2d 314, 320 (1968). The law never presumes a gift. *Rabinof* v. *United States,* 329 F. Supp. 830, 839 (S.D. N.Y. 1971). All three facts, but especially the first two,

[1] Now, with certain exceptions, Treasury checks may be negotiated without time limit. 31 U.S.C. § 3328 (formerly 31 U.S.C. § 132).

should be proven. The burden of proving a gift is upon those claiming it, and the evidence or proof must be clear and convincing.

Based on the record in this case, we have no evidence as to any of the essential elements. The claimants know only that the checks were found with Mr. Sixbury's personal effects after his death. From this information, we cannot assume that delivery took place, that Mr. Howeth had donative intent, or that Mr. Sixbury accepted the gift sometime between 1937 and 1954, the year of Mr. Howeth's death. Possession by one claiming property as a gift is insufficient to prove a valid gift. *Duboff* v. *Duboff,* 186 N.Y.S. 2d 760 (1959); accord, *In Re Hackenbroch's Estate,* 182 N.E. 2d 375, 377 (D. Ill., 1962).

In conclusion, we fail to find evidence of either the proper requirments for the transfer of the negotiable instruments or of the essential elements of a gift. Therefore, on the facts presented, we determine that there is no basis for the Treasury Department to make payment to Mr. and Mrs. Snyder.

[B-207177]

Contracts—Negotiation—Requests for Proposals—Specifications—Specificity—Sufficiency

Procuring agency generally must give offerors sufficient details in request for proposals to enable them to compete intelligently and on relatively equal basis. Where the solicitation sets out estimates as to the extent of the number of services required for evaluation purposes, establishes a minimum ordering requirement, and identifies the types and levels of services required, the solicitation is sufficient for the preparation of proposals.

Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—Agency Determination to Use Less Restrictive Specifications

Protest urging that performance type specifications be revised to require certain elements of protester's equipment configuration is in effect an allegation that a more restrictive specification should be used. Agency determination that performance type specification is adequate and that conforming equipment will meet Government's needs will not be questioned.

Contracts—Negotiation—Offers or Proposals—Evaluation—Life-Cycle Costing—Indefinite, Future Needs

Where agency specifies additional features of a system to assure their availability in the future and requires offerors to state prices for those additional features, but agency has no known requirement for those features at the time of procurement, the solicitation need not contain estimates of the usage of those features and they need not be included in the overall price evaluation.

Matter of: Cincinnati Bell Telephone Company, January 17, 1983:

Cincinnati Bell Telephone Company protests that request for proposals No. 5FCC-TC-81-137, issued by the General Services Administration to obtain a telephone system for the Cincinnati, Ohio

area, should be revised to clarify the Government's requirement and to provide a common basis for evaluation. We deny the protest.

The solicitation calls for an indefinite quantity, indefinite delivery, fixed price contract, with minimum ordering requirements, covering 10 years, including option periods. The selected contractor will engineer, install and maintain a complete system with 4,500 to 6,000 telephones, including necessary lines, switching gear and related equipment needed to serve some 150 Federal agencies located throughout the Cincinnati area. Offerors are to propose the types of equipment that they believe will satisfy the Government's specified technical requirements and service levels, together with unit prices for that equipment, on the basis of lease, purchase, or combinations thereof. Award is to be made on the basis of the technically conforming proposal that offers the lowest evaluated life cycle cost.

GSA originally issued the solicitation on April 20, 1981, but due to numerous questions raised by offerors, GSA canceled, then revised and reissued the solicitation on November 11, 1981. Since that time Bell has raised additional objections to the terms of the solicitation in a series of letters to GSA, many of which GSA resolved to Bell's satisfaction. The remaining issues were timely protested to this Office by Bell's letter of April 19, 1982, the day before proposals were due. A number of these issues have also been resolved; only those discussed below remain open. GSA advises that it is continuing to negotiate with the offerors pending our decision on the protest.

Bell first contends that the solicitation is defective because it fails to adequately describe how the six-button telephones specified in clause T-550 will be used. Bell argues that these six-button telephones are only one portion of a key telephone system and that additional information, particularly the number of key units and key line units, the number of telephones associated with each key line unit, and the number of lines connected to each telephone must be provided to enable offerors to estimate costs. In the absence of such information, Bell argues, the specification is indefinite and ambiguous, so that offerors are not competing on a common basis. In support of its position, Bell has submitted examples of typical key telephone systems showing widely varying cost differences. Bell urges that GSA should revise the solicitation to define typical key telephone system configuration in order to assure equality in the bidding process.

Bell further contends that clause T-550 of the solicitation fails to properly define expansion requirements for the key telephone systems. According to Bell, although the clause shows anticipated growth in the number of six-button telephones, it does not show anticipated growth in the number of key telephone units. Moreover, Bell argues, GSA's projections for the number of six-button telephones needed in the 96th month of the contract is not consistent with the number of key telephone units specified in Attachment 2,

clause T-554. Bell therefore concludes that the future requirements are also ambiguous.

GSA contends that offerors have all the information needed to prepare adequate proposals. GSA points out that its requirements are stated in terms of number of telephones, numbers of lines, types of services provided, levels of service, and building locations, but no equipment configuration is specified; offerors are to propose that combination of equipment they believe best serves the Government's needs. Since each offeror is required to propose the same quantity of telephones, the same equipment capacity, and the same service levels and since as many other costs to the Government as are identifiable, quantifiable and reasonably certain to be incurred are taken into account in the price evaluation, GSA argues that the relative standing of the offerors' price proposals is reflective of their ultimate probable cost to the Government.

GSA asserts that Bell's key station equipment which operates the six-button telephones is not configured the same as its competitors. Under the Bell system, it is necessary to install a key telephone unit on a common control unit to control each six-button telephone. Each common control unit may control one or more key systems and is separate from the system's main switching gear. Other vendors, however, offer main switching gear which control key systems directly, without the need for an intervening common control unit.

GSA also argues that Bell's examples of different, but typical, key system arrangements reflecting widely varying costs are misleading since the arrangements differ primarily in the number of six-button telephones installed, which presumably will be priced separately by Bell. As to any alleged inconsistency between the stated future requirements and Attachment 2, Clause T-554, GSA points out that the latter is simply a listing of equipment now installed, provided for reference purposes only, and that the projected contract requirements will vary over time as indicated in the tables at clause T-550.

The determination of the Government's minimum needs and the method of accommodating them are properly the responsibility of the contracting agency. *Maremont Corporation*, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. However, the solicitation requirements must be free from ambiguity and describe the minimum needs of the procuring activity. *Klein-Sieb Advertising and Public Relations, Inc.*, B-200399, September 28, 1981, 81-2 CPD 251. This does not mean that all elements of the requirement must be so precisely specified that the contract is free from risk; rather, some risk is inherent in most contracts and offerors are expected to allow for risks in their offers. See *Klein-Sieb Advertising and Public Relations, Inc., supra.*

We believe that the Government's minimum needs have been specified with the requisite degree of specificity here, given the

nature of the procurement, contemplating a changing level of performance over a 10-year period.

Knowledgeable offerors can adequately protect themselves in these circumstances, through their proposed pricing structure. Bell is free to estimate the cost of the equipment needed to support a key telephone system and include those costs in its price for individual six-button telephones, or it may choose to avoid the risk of estimating costs on that basis and separately price each component of its key telephone system. In any event, given GSA's uncontradicted assertion that Bell's competitors offer alternative configurations for supporting key telephone systems that also satisfy the Government's minimum needs, GSA has no basis for restricting competition to Bell's type of equipment, which specifying key units and key line units would necessarily do. See *Ultraviolet Purification Systems, Inc.*, B-192783, August 20, 1979, 79-2 CPD 132. Consequently, we cannot agree with the assertion that the components of Bell's key line system should be specified.

Originally Bell argued that clause T-413, which requires that replacement parts be available for the system life, was ambiguous because it could refer to either the 10-year contract life or the 18½-year system life assumed in clause T-419 for cost evaluation purposes. In response, GSA stated the contractor will not be required to make replacement parts available beyond the life of the contract since 40 U.S.C. 481(a)(3) (1976) establishes a maximum period of 10 years for telecommunications contracts. Bell now contends that there is a material contradiction between clauses T-413 and T-419 because they contemplate differing periods of time. However, Bell has not explained why the two differing periods create a contradiction and therefore we deny Bell's protest in this respect.

Bell also contends that GSA should provide offerors with additional information for estimating the cost of providing radio paging, dial dictation and centralized attendant services. Clause T-540 identifies these as additional features which the offered equipment must be capable of providing should the Government, in its discretion, decide to procure them. Offerors are required to price these features, although that price will not be included in the Government's cost evaluation.

Bell argues that it cannot prepare prices for these features without an estimate of their usage during the life of the contract and an indication where GSA intends to locate its attendant services. Further, Bell emphasizes that centralized attendant services are required to operate the system in any event, pointing out that GSA now employs five attendants in Cincinnati.

GSA replies that these additional features have been identified as future potential requirements of the Government that must be included in the solicitation to assure their availability should they be needed at a later date. However, since there is no present or defined future requirement for these features, their anticipated

usage has been described with the greatest degree of specificity possible, *i.e.*, none, and they are therefore not included in the cost evaluation. As to the necessity for centralized attendant services, GSA recognizes that it presently employs people in Cincinnati for this purpose, but consistent with its policy of reducing the number of attended locations nationwide, GSA does not intend to provide this service with the new telephone system. As a consequence, GSA concludes that it has no definite requirement for any of the questioned additional features.

Where appropriate, an agency's minimum needs may properly include consideration of system capabilities that will permit the Government to satisfy potential requirements that may arise in the future. See *California Computer Products, Inc.*, B-193329, July 3, 1979, 79-2 CPD 1. However, the agency's cost evaluation need not include prices for items where the agency lacks the data on which it believes a reasonably accurate estimate can be based. See *Tex-La Cable T.V., Inc.*, B-201558, April 5, 1982, 82-1 CPD 300. We believe that GSA has reasonably demonstrated that although it has a potential requirement for these additional services, it does not have sufficient information on which to base a reasonably accurate estimate.

Bell also argues that GSA has failed to adequately define its requirements for maintenance and associated services specified in clause T-507 and for engineering and consulting services specified in clause T-505. Bell argues that offerors need additional information on the anticipated amount of these services to prepare their proposals and asks that GSA provide estimates in the same manner that it did under clause T-419 concerning the anticipated number of telephone installations, removals, and rearrangements that will occur during contract performance.

GSA replies that offerors normally include the cost of maintenance service in their price for the equipment proposed, but that offerors are free to propose separate maintenance prices based upon their knowledge of their own equipment. GSA further states that it has not included engineering and consulting services in its price evaluation because it anticipates only a negligible amount will be required. GSA explains that most of these services are provided incident to system design and included in the price of the equipment; that GSA maintains its own professional staff for any additional work; but that it is desirable to obtain a price for these services in case of unforeseen events, such as disasters. As a consequence, GSA contends that it has provided offerors with all the information required to calculate costs and prepare proposals and that all costs reasonably certain to be incurred will be taken into account in the Government's price evaluation.

We believe that GSA's explanation is persuasive. Given the circumstance that maintenance service is customarily included in the price of equipment and the fact that maintenance will vary with

the type of equipment proposed, GSA's treatment of maintenance prices is unobjectionable. Further, because the requirement for maintenance service is dependent upon the type of equipment proposed, this requirement is distinguishable from such follow-on services as telephone relocations, which are dependent upon Government action. Further, GSA's assertion that, although the amount of engineering and consulting services to be ordered cannot be predicted with a reasonable degree of accuracy, only a negligible amount is anticipated, is uncontradicted by the record. Consequently, the price of such services does not appear to be necessary for price evaluation. See *Tex-La Cable T.V., Inc., supra.*

The protest is denied.

[B-206196]

General Accounting Office—Jurisdiction—Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Appeal of Agency's Analysis

Protest of Army's consideration of appeal of comparative cost analysis and agency's subsequent decision to sustain that appeal and to order new management study under Office of Management and Budget (OMB) Circular A-76 analysis is subject to General Accounting Office review where solicitation establishes ground rules for the appeal process.

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Cancellation of Solitication—Specification Changes—Minimum Needs Overstated

Cancellation of invitation after bid opening is proper where Government determines, albeit after allegedly inappropriate consideration of OMB Circular A-76 appeal, that solicitation's statement of work overstates actual minimum needs and that Government is no longer able to furnish a significant amount of the Government Furnished Equipment identified in the solicitation.

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Cancellation of Solicitation—Specification Changes—Anticipated Prior to Award

Agency may not avoid canceling solicitation where it is aware before award of need for specification changes by use of Changes and Government-Furnished Property clauses which provide for an equitable adjustment for property not delivered by the Government.

Bids—Preparation—Costs—Noncompensable—Invitation Properly Canceled

Claim for bid preparation costs is denied where the claimant has not shown that agency has abused its discretion in canceling the solicitation.

Matter of: D-K Associates, Inc., January 18, 1983:

D-K Associates, Inc. protests the Army's cancellation of invitation for bids DAKF27-80-B-0206 for the operation of the Training and Audiovisual Support Center at Ft. Meade, Maryland. The solicitation, which was issued as a part of a cost comparison under

Office of Management and Budget (OMB) Circular A-76, was canceled primarily because an agency management study resulting from an appeal of the cost comparison analysis revealed inaccuracies in the solicitation's list of Government Furnished Equipment (GFE). Essentially, D-K contends that the appeal of the cost comparison should not have been considered, that the management study should not have been conducted and that in any event, the Army did not have compelling reasons to cancel the solicitation. D-K claims that it is entitled to either contract award or bid preparation costs. We deny the protest.

In 1981, the Army developed a statement of work, conducted a management study and prepared an in-house cost estimate in anticipation of issuing the subject solicitation. The estimate was based on the assumption that 43 civilian employees and seven buildings would be required for the Army's operation of the Center. The Army also concluded that $1.2 million in GFE would be provided the contractor if the function were contracted out.

The Army issued the solicitation on May 7, 1981. The solicitation advised bidders that it was part of a cost comparison to determine whether accomplishing the work in-house using Government employees or by contract would be more economical. The solicitation also provided that, prior to a final determination regarding contracting out, interested parties would be given time to review the cost comparison data and could appeal the results of that comparison. Bids were opened on June 22 and D-K's bid was the lowest of the five bids received from commercial firms. The agency determined as a result of its cost comparison that it would be most economical to contract out the function to D-K.

On July 17, a civilian employee of the Center appealed the agency's proposed decision to contract out this activity. The employee contended that the cost comparison was not based on the optimum organizational structure for the operation of the Center and argued that the organization and staffing could be improved at savings to the Government. On September 3, the U.S. Army Forces Command Appeals Board sustained the appeal in part and directed Ft. Meade to conduct a new management study and develop a revised estimate for performance in-house. By letter of October 8, D-K protested to the Army that its consideration of the appeal was improper. The Army denied the protest by letter of November 10.

Meanwhile the new management study was completed on November 6. It produced recommendations to close some buildings and renovate others, which would result in the use of only four buildings for the Center instead of the seven stated in the solicitation's statement of work and in the reduction of the personnel needed from 43 to 32. In conjunction with the new study, Ft. Meade reviewed the solicitation's provisions on workload and GFE. A complete inventory of the Center revealed the unavailability of approximately $368,000 worth of equipment identified as GFE in the

original statement of work, as well as approximately $86,000 worth of equipment acquired subsequent to the development of the statement of work and not listed in the solicitation. Based on these findings and the fact that the prolonged evaluation period would require that the proposed start date be delayed at least 6 months, the agency concluded that the solicitation should be canceled. It informed D-K of its decision by letter of January 11, 1982.

The agency canceled the solicitation notwithstanding a memorandum dated November 25 from the Deputy Assistant Secretary of Defense (Facilities, Environment and Economic Adjustment) concurring with an Office of Federal Procurement Policy (OFPP) letter dated November 19 which concluded that the appeal should not have been considered. The OFPP letter stated that it was improper for contracting activities to consider appeals involving OMB Circular A-76 determinations after bid opening where the issue raised concerns whether the agency has chosen the most efficient approach for performing the function in developing its in-house cost estimate. The Army, however, states that it decided to complete its reevaluation since by the time it received the November 25 memorandum the new management study was completed and in the final stages of review and the preliminary inventory showed a substantial variance from the list of GFE included in the solicitation.

D-K objects to the rejection of its low bid and the cancellation of the solicitation on two main grounds. First, the protester contends that the appeal filed by the Center employee should not have been considered and the second management study resulting from that appeal should not have been conducted because neither the solicitation nor agency regulations contemplated appeals based on the management approach chosen by the Government. Second, the protester argues that even if the appeal and the resulting management study were proper, the conditions cited by the agency as justifying the cancellation are insignificant.

D-K's position concerning the propriety of the appeal and the second management study is fourfold. First, D-K asserts that the appeal challenged the original management study and not the cost comparison analysis as provided for in the solicitation, Department of the Army (DA) Circular No. 235-1, para. 3-6d and OMB Circular A-76. Second, the protester states that no evidence has been introduced to indicate that the conclusions of the original study were unfounded or that the list of GFE was inaccurate at the time the cost comparison analysis was conducted. Third, D-K claims that the appeal was lodged after exposure of its bid and that elements of that bid subsequently formed the basis of the employee's appeal as well as the basis of the reorganization plan in the second study. Lastly, D-K asserts that the new study was contrary to the OFPP letter as adopted by the Department of the Defense (DOD).

The Army states that we should not consider this matter because the cost comparison analysis involves OMB Circular A-7, and im-

plementing Department of the Army regulations, which reflect only executive policy and which we regard as outside the scope of our Bid Protest Procedures, 4 C.F.R. Part 21 (1982).

Generally, we do not review an agency decision to perform work in-house rather than to contract for the services because we regard the decision as a matter of policy within the province of the Executive branch. *Midland Maintenance, Inc.,* B-202977.2, February 22, 1982, 82-1 CPD 150. Where, however, an agency uses the procurement system to aid in its decision making, spelling out in the solicitation the circumstances under which the Government will award or not award a contract, we will review whether the agency followed announced procedures in comparing in-house and contracts costs. We do so because we believe it would be detrimental to the system if, after the agency induces the submission of bids, it deviates from the ground rules or procedures announced in the solicitation and which were relied on by those induced to bid. See, e.g., *Mar, Inc.*, B-205635, September 27, 1982, 82-2 CPD 278; D-K Associates, Inc., B-201503, B-201625, September 10, 1981, 81-2 CPD 208.

Our prior cases have involved a challenge to the actual cost comparison that was made, with the protester asserting that the comparison rules announced in the solicitation—usually those found in OMB's Cost Comparison Handbook or in other agency regulations—were not followed. See, e.g., *Mar, Inc., supra; Crown Laundry & Dry Cleaners, Inc.*, 61 Comp. Gen. 233 (1982), 82-1 CPD 97, *affirmed* B-204178.2, August 9, 1982, 82-2 CPD 115; *Serv Air, Inc., A VCO,* 60 Comp. Gen 44 (1980), 80-2 CPD 317. This case is somewhat different because the protester does not challenge the cost comparison; rather, it challenges the Army's decision to consider the employee's appeal and to conduct a second management study, and ultimately to cancel the solicitation and resolicit. This difference is not material to the question of whether we should consider the protest, however, because the invitation contained a provision dealing with appeals and, in our view, established the ground rules for the cost comparison appeal process. Moreover, the challenge to the cancellation of the invitation is appropriate for our review since we believe the general rules applicable to cancellation after bid opening, *see* Defense Acquisition Regulation (DAR) § 2-404.1 (1976 ed.), are applicable to solicitations issued for Circular A-76 cost comparison purposes since the competitive bid system is involved.

Under the circumstances, however, we need not consider the propriety of the Army's consideration of the appeal because we believe that regardless of whether the appeal should have been considered the cancellation[1] of the invitation was appropriate.

[1] The Army contends that the protest of the cancellation is untimely. It argues that D-K was told by the contracting officer in a telephone conversation on December 22 that the solicitation was to be canceled, but D-K did not file its protest until January 26, more than 10 working days after it had knowledge of the basis for the protest. *See* 4 C.F.R. § 21.2(b)(2) (1982). However, on December 22, D-K was merely advised of the agency's intent to cancel—no final decision had been made at that time. The Army did not actually cancel the solicitation until it issued its January 11 letter notifying D-K of the cancellation. As D-K filed its protest on January 26, within 10 working days of its request of that notification, the protest is timely.

The general rule regarding cancellation after bid opening and the exposure of bids is that such cancellation is not proper unless it is warranted by a cogent and compelling reason. *McGregor Printing Corporation*, B-207084, B-207377, September 20, 1982, 82-2 CPD 240. One recognized basis for cancellation is that the solicitation did not reflect the Government's actual minimum needs. See *Praxis Assurance Venture*, B-190200, March 15, 1978, 78-1 CPD 203. As we pointed out in that case:

> * * * when * * * an invitation for bids contains specifications which overstate or misstate the minimum needs of the procuring agency, or the agency decides after bid opening that the needs of the Government can be satisfied by a less expensive design differing from that on which bids were invited, the best interest of the Government requires cancellation of the invitation. * * *

Here, even if we assume that the Army's consideration of the appeal was inappropriate, it learned as a result of the appeal and subsequent management study that its original statement of work overstated its actual needs and that there was a less expensive approach to satisfying those needs. While the Army should have determined the most advantageous approach prior to soliciting bids, nothing requires it to be locked into a less advantageous approach, either through in-house performance or contracting out, which exceeds its minimum performance needs. That an agency will discover after bid opening that its needs have been overstated in a solicitation is simply one of the risks faced by those who bid on Government contracts.

Moreover, the disparity discovered with respect to the GFE also provides a basis for the cancellation. The variance discovered in the $1.2 million worth of GFE listed in the solicitation was substantial, amounting to $368,000. The agency also found that equipment worth $86,000 had been acquired since the list in the IFB had been computed. Although it is true, as D-K argues, that these changes in the GFE list did not alter the description of the services needed in the solicitation, the change in the GFE list significantly alters the resources available for use by both commercial bidders and the Government in performing these services and thus changes the basis upon which bidders and the Government computed their prices. In such circumstances, we have recognized that cancellation is appropriate. See *Monarch Enterprises, Inc,* B-201688, June 15, 1981, 81-1 CPD 483; *Aul Industries, Inc.,* B-195887, February 6, 1980, 80-1 CPD 98.

Further, we do not agree with D-K's assertion that this matter could be accommodated by the Government-Furnished Property (GFP)[2] and the Changes clauses included in the solicitation. Both provisions (the GFP clause provides for an equitable adjustment under the Changes clause for property not delivered by the Government) are concerned with changes which occur after the award of

[2] There is no difference between GFE and GFP here. The list in the solicitation was designated GFE while the clause uses the term GFP.

the contract and are not to be used to make changes which like these are known prior to contract award. See *Central Mechanical, Inc.*, B-206030, February 4, 1982, 82-1 CPD 91; DAR §7-104.24(f). The integrity of the competitive bidding system requires that the agency not award a contract competed for under one set of provisions with the intention of changing to a different set after award. See *W. M. Grace, Inc.*, B-202842, August 11, 1981, 81-2 CPD 121.

In conclusion, we find that the Army's cancellation of the solicitation was proper. Accordingly, we cannot find that D-K has been subjected to arbitrary and capricious treatment, a showing of which is a prerequisite to entitlement of bid preparation costs, and therefore the protester is not entitled to recover such costs. See *Man Barrier Corporation*, B-197208, August 5, 1980, 80-2 CPD 88.

The protest and claim are denied.

[B-206972]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Nonresponsibility Finding—Referral to SBA for COC Mandatory Without Exception

Contracting officer's determination of nonresponsibility, based on finding that small business concern otherwise in line for award does not have acceptable quality assurance system to perform required work, must be referred to Small Business Administration (SBA), albeit on an expedited basis, for consideration under certificate of competency (COC) program, since applicable law and regulations no longer allow exception to this requirement based on urgency. However, General Accounting Office recommends that Executive branch consider developing expedited COC procedure to permit prompt consideration of COC referrals by SBA when critically urgent procurements are involved.

Matter of: Metal Service Center, January 18, 1983:

Metal Service Center, a small business, protests the determination that it was nonresponsible and therefore not eligible for the award of a contract under invitation for bids (IFB) No. N00612-82-0009 issued by the Naval Supply Center, Charleston, South Carolina. Because there was an urgent need for the items being procured, the agency made award to another bidder without referring the question of Metal Service Center's responsibility to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) program. Metal Service Center maintains that the nonresponsibility determination was based on erroneous and outdated information and that the award of the contract is illegal because, as a small business, it had the right to apply for COC from the SBA, but was never given the opportunity. For the reasons discussed below, the protest is sustained.

The IFB, issued January 18, 1982, solicited bids for two lengths of copper-nickel alloy tubing which was required by the Navy as piping material for the overhaul of nuclear submarines. The IFB identified the requirement as "Level I" which indicated that the material was to be used in high pressure piping systems operating under

critical conditions. As a result, the IFB contained numerous stringent quality assurance requirements, including a requirement for the contractor to maintain an inspection system in accordance with Military Specification MIL-I-45208 in effect on the date of the contract (Defense Acquisition Regulation (DAR) § 7-104.33 (DAC 76-28, July 15, 1981)).

The IFB was mailed to 21 prospective bidders with bid opening scheduled for February 17, 1982. Three bids were received and Metal Service Center submitted the low bid. By letter of February 22, Metal Service Center advised the contracting officer that the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania, had recently conducted a technical survey to establish the firm's ability to comply with Level I and MIL-I-45208A requirements. The survey report, dated November 20, 1981, was forwarded to the contracting officer by quality assurance personnel on February 25, 1982, 8 days after bid opening. The report cited numerous deficiencies in the contractor's quality control manual and system, and recommended changes to implement the quality assurance requirements of the military specifications. On that same day, Navy quality assurance personnel reported to the contracting officer that representatives of the Defense Contract Administration Services Management Area Atlanta (DCASMA) orally indicated that Metal Service Center, as of that date, had failed to correct the deficiencies noted in the survey report. The Navy's quality assurance personnel then prepared a "Vendor Performance Summary Report," dated February 25, recommending that no award be made to Metal Service Center because of the urgency of the requirements, noting that a second technical survey of the firm, then scheduled for mid-March 1982, was necessary to determine its compliance with contract quality requirements.

On February 26, the Director, Regional Contracting Department, determined Metal Service Center to be nonresponsible and concluded that award should be made without delay and without referral of Metal Service Center's nonresponsibility determination to the SBA for processing under the COC procedures. He based his decision on the following finding:

> The fifteen day delay required for the SBA to make a decision on whether to issue a Certificate of Competency will result in failure to meet the final critical overhaul milestone objective of [a nuclear submarine which would also result in] a failure to return this nuclear submarine to the operating fleet on schedule.

He further determined that a "concomitant result of the delay" would be the "nonavailability" of the drydock for overhaul of another nuclear submarine.

Award was made to Metal Mart, Inc., the second low bidder, on March 1, 1982. The contract was modified on March 29 to accelerate delivery by shipping the material air express. Delivery occurred on April 12, 1982.

Metal Service Center argues that the contracting officer's determination of nonresponsibility was improper since a formal preaward survey would have shown that the company had, in fact, corrected all the deficiencies disclosed by the November technical survey, when, on January 19, 1982, it furnished to DCASMA all the necessary revisions to its quality assurance system. Metal Service Center also questions the urgency of the procurement, noting that the contracting officer took from February 17 to February 25 to orally contact DCASMA about the status of Metal Service Center's quality assurance system and also noting that the procurement was effected by formal advertising rather than by expedited negotiations. The protester also points to the fact that 5 calendar days elapsed between the receipt by the contracting officer of the unfavorable survey report and award of the contract to the second low bidder, which the protester considers to be an unreasonable delay in view of the stated urgency of the procurement. Finally, the protester objects to the contracting officer's failure to refer the question of its responsibility to the SBA as required by the Small Business Act.

The Navy admits that the contracting officer had no legal basis for not referring the question of Metal Service Center's responsibility to SBA and that he violated the Small Business Act in failing to do so. However, the Navy excuses this failure on the grounds that the contracting officer nevertheless acted "reasonably" under the "critical" factual circumstances of this procurement.

The Navy explains that during the overhaul of nuclear submarines a "critical path" must be maintained which requires completion in sequence of each stage of the overhaul process. After issuance of the IFB, the critical path for the submarine undergoing overhaul was accelerated, requiring delivery of the tubing at the earliest possible date and not later than April 15. (The high pressure piping system was to be used in the emergency blow-out system for the ballast tanks on the nuclear submarine.) After DCASMA reported to the contracting officer on February 25 that Metal Service Center had not corrected the deficiencies noted in the technical survey, the Navy's technical experts advised the contracting officer that Metal Service Center could not correct the deficiencies and deliver the required material by April 15. Further, the contracting officer was advised that any slippage in delivery of the material would delay the undocking of the submarine and the drydocking of another submarine, with an estimated cost to the Government because of submarine scheduling delays of $36 million.

According to the Navy, the contracting officer did not request a formal preaward survey of Metal Service Center because completion of the survey would have required 10 to 30 days. Similarly, the contracting officer did not refer the question of the company's responsibility to the SBA because processing of the COC application would have required approximately 15 days. Therefore, because of

his concern that the required material be timely delivered, the contracting officer awarded the contract to the second low bidder.

Finally, the Navy argues that, in any event, once the requirement for an acceleration of the delivery schedule materialized after bid opening, it could have canceled the IFB since the delivery schedule of June 17, 1982, set forth in the solicitation no longer represented its needs. The Navy asserts that after such cancellation the contracting officer would have had the authority to negotiate the requirements from only those vendors whose quality assurance systems were approved at the time and thus able to comply with the new accelerated required delivery date. The Navy thus argues that the protester was not prejudiced by the Navy's failure to refer the question of its responsibility to SBA since viable alternate procurement actions existed which also would have resulted in the exclusion of that firm.

We believe that by beginning its procurement process earlier the Navy could have avoided the scheduling dilemma in which it found itself. In addition, we question the magnitude of the damages which the Navy estimated would result from the delay in receiving the piping—$36 million—which figure was without any substantiation. Nevertheless, we would agree that the record supports the conclusion that following the opening of bids the Navy found itself in urgent need of materials, delay in the receipt of which could cost the Government far more than the $8,000 difference between the low bid of the protester and that of the awardee. These circumstances, however, do not excuse the contracting officer's failure to refer the question of Metal Service Center's responsibility to the SBA as required by the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV 1980).

Under the Act, a small business may not be precluded from award on the basis of nonresponsibility without referral of the matter to the SBA for final disposition under the COC procedures and the SBA is empowered to certify conclusively to Government procurement officials with respect to all elements of responsibility. *See Com-Data, Inc.,* B-191289, June 23, 1978, 78-1 CPD 459. The language and legislative history of the Act and SBA's implementing regulations provide no exception to this referral procedure. *See* H.R. Rep. No. 95-1, 95th Cong., 1st Sess. 18 (1977); H. Conf. Rep. No. 95-535, 95th Cong. 1st Sess. 21 (1977); reprinted in [1977] U.S. Code Cong. & Ad. News 838, 851; 13 CFR § 125.5 (1982). In a prior decision concerning a procurement by the Veterans Administration, we noted specifically that the statute "makes no exception for urgency as a ground for not referring the question of a small business's responsibility to SBA" and that the Federal Procurement Regulations had been amended to eliminate the urgency exception previously allowed. *Hatcher Waste Disposal,* 58 Comp. Gen. 316 (1979), 79-1 CPD 157. In this regard, the urgency exception previously pro-

vided by DAR § 1-705.4(c)(iv) also has been deleted by Defense Acquisition Circular (DAC) 76-18, March 12, 1979, at 26.

The Navy argues that the contracting officer acted reasonably under the unusual circumstances of this case. However well-meaning the contracting officer may have been, his actions were in direct contravention of a statute which requires, without exception, that the question of a small business concern's lack of responsibility must be referred to the SBA for consideration under the COC procedures. We do not think that a knowing violation of Federal law is reasonable. In addition, while DAR § 1-705.4(c) (DAC 76-24, August 28, 1980) does provide for withholding of award until SBA action concerning issuance of a COC is taken or until 15 days after the SBA is notified, in view of the urgency of this procurement, we believe the contracting officer and the SBA should have attempted to arrange for an expedited review by the SBA of Metal Service Center's responsibility.

With respect to the Navy's argument that the protester was not prejudiced because the solicitation could have been canceled and the requirements negotiated only with qualified offerors, the fact remains that the Navy made award under the advertised solicitation and did not comply with the law in so doing. Moreover, on this record we cannot say that the protester properly could have been viewed as unqualified for participation in a follow-on negotiated procurement.

For the foregoing reasons, we sustain the protest. However, since the contract has been performed, no corrective action is possible in this case. Nevertheless, we believe this case suggests the need for an expedited COC procedure so that contracting officials can meet the Government's most urgent procurement needs while complying with the Small Business Act. To that end, we are recommending to the Office of Federal Procurement Policy that the Executive branch consider the development of such a procedure.

[B-206152]

Contracts—Annual Contributions Contract-Funded Procurements—Complaints—Timeliness—"Reasonable Time" Standard

Complaint against action of grantee filed with General Accounting Office 16 working days after an adverse agency decision will be considered since complaint was filed within a "reasonable" time.

Contracts—Annual Contributions Contract-Funded Procurements—Indian Low-Income Housing—Preference to Indian Firms—Bid Nonresponsive—Nonresponsibility Basis

Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise.

Matter of: Bradley Construction, Inc., January 24, 1983:

Bradley Construction, Inc. (Bradley) has filed a complaint concerning the refusal of the Zuni Housing Authority (ZHA) to consider its bid submitted in response to an invitation for bids for a construction contract for three Demonstration Housing Units in the Zuni Pueblo Indian Reservation for project No. NM19-11. Bids were limited to 100-percent Indian-owned organizations and Indian-owned economic enterprises and bid opening was scheduled for December 11, 1981. Bradley contends that the ZHA arbitrarily and capriciously refused to consider its bid which was returned unopened. Bradley also objects to the subsequent issuance of another solicitation which was not limited to Indian-owned firms and the award to Hunt Building Corporation (Hunt).

Based upon our review of the record, we deny the complaint.

Background

On January 16, 1976, the United States of America and the ZHA entered into Annual Contributions Contract No. SF-651, pursuant to the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* (1976), and the Department of Housing and Urban Development Act, 42 U.S.C. § 3531 (1976). Under the Annual Contributions Contract (ACC) the ZHA agrees to develop and operate low-rent housing projects and the Government agrees to provide financial assistance for such projects in the form of annual contributions. On July 13, 1981, the United States Department of Housing and Urban Development (HUD) and the ZHA entered into an Amendatory Agreement to the Annual Contributions Contract, concerning project No. NM99-11 for the development of three units of housing at a maximum development cost of $750,000.

The IFB provided that any firm seeking to qualify as an Indian contractor submit evidence 15 days prior to bid opening sufficient to establish to the satisfaction of the ZHA its qualifications as an Indian organization or an Indian-owned economic enterprise. Pursuant to 24 C.F.R. § 805.204(a)(3), this prequalification package also was to contain sufficient evidence to demonstrate that the prospective contractor had the technical, administrative and financial capability to perform contract work of the size and type involved and within the time provided under the proposed contract.

On December 9, 1981, the Board of Commissioners reviewed Bradley's November 25, 1981 submittal for qualification as an Indian organization or an Indian-owned economic enterprise. Based on the evidence submitted, the ZHA determined that Bradley did not have the technical, administrative and financial capacity to perform contract work of the size and type involved within the time provided under the proposed contract. Bradley was informed of this determination by mailgram on December 9, 1981.

At the December 11, 1981 bid opening, the only bid received was the one submitted by Bradley which was rejected by the ZHA and returned unopened. On December 23, 1981, HUD authorized the ZHA to readvertise for bids without limiting the advertisement to Indian-owned organizations or Indian-owned economic enterprises and on the same date ZHA denied Bradley's protest to it regarding the rejection of its bid.

HUD regulation, at 24 C.F.R. § 805.204(a)(2), provides that if an Indian Housing Authority (IHA), after attempting to afford Indian preference in the award of the contract, fails to receive an acceptable bid from one or more qualified Indian enterprises, it:

> * * * may advertise for bids or proposals without limiting the advertisement to Indian Organizations and Indian-owned Economic Enterprises and as in all cases shall accept the lowest responsible bid or the best proposal.

Four bids were received on January 20, 1982, and the low bid was submitted by Hunt in the amount of $521,000. Bradley submitted the second low bid of $578,000. Award was made on February 25, 1982, to Hunt as the low responsive bidder.

Bradley protested to our Office by mailgram dated January 18, 1982, received here on January 20, 1982, the rejection of its unopened bid and the subsequent readvertisement. In addition Bradley sent another mailgram dated January 20, 1982, which was received here on January 27, 1982, protesting the new bid opening of January 20, 1982, because it felt its bid of December 11, 1981, met the ZHA requirements. In effect, the later mailgram was a restatement of the earlier one.

While this procurement is not a direct Federal procurement and, therefore, not reviewable under our Bid Protest Procedures, 4 C.F.R. part 21 (1982), we have recognized that contracts pursuant to ACC's are reviewable under our Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants." 40 Fed. Reg. 42406 (1975). See *Curtiss Development Co. and Shipco, Inc.*, 61 Comp. Gen. 85 (1981), 81-2 CPD 414.

Timeliness

HUD contends that Bradley's complaint is untimely under 4 C.F.R. § 21.2(a) (1982) of our Bid Protest Procedures since it was not filed within 10 days of the ZHA's decision to reject it. We point out that since this is not a direct Federal procurement, the time limits of our Bid Protest Procedures are not literally applicable to our review of grant complaints but we require that complaints be filed within a reasonable time. *Urban Transportation Development Corporation, Ltd.*, B-201939, August 7, 1981, 81-2 CPD 107.

Bradley protested the ZHA's rejection of its bid on December 11, 1981, and, as noted earlier, the ZHA denied the protest on December 23, 1981, which Bradley should have received within 1 calendar week. On January 8 and 12, 1982, Bradley sent letters to HUD ap-

pealing the ZHA decision and providing further documentation concerning its Indian status. On January 13, 1982, HUD responded to Bradley's January 8, 1981 letter concerning the December 11, 1981 bid opening. HUD found that the ZHA had complied with the rules and regulations governing the development of Indian housing and with the IFB on project NM19-11.

We find Bradley's complaint dated January 18, 1982, and received on January 20, 1982, for consideration on the merits since we believe its complaint, filed 16 working days after the ZHA denied its protest, was filed within a "reasonable" time after the basis was known. Contrary to HUD's assertion, we find the first mailgram adequately stated Bradley's grounds for complaint and the second mailgram added nothing which would require our Office to use January 27, 1982, as the filing date.

Essentially, the basis of Bradley's protest is that the ZHA improperly returned its bid unopened after determining that the Bradley prequalification package failed to demonstrate that Bradley has the "prerequisite technical, administrative and financial capability to perform contract work of the size and type involved within the time provided under the proposed contract." Bradley also protests the resolicitation on the ground that it was not required since an award could have been made to Bradley under the original solicitation.

Pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450e (1976), HUD regulations permit an IHA to include in solicitations special HUD-approved Indian preference requirements. HUD regulations at 24 C.F.R. § 805.204 provide that an IHA shall to the "greatest extent feasible" give preference in the award of contracts in connection with a project to Indian organizations and Indian-owned economic enterprises. Here the ZHA issued an IFB limited to 100-percent Indian-owned organizations and Indian-owned economic enterprises. The IFB required a prospective contractor seeking to qualify for the preference to submit, 15 days prior to bid, opening evidence sufficient to establish its qualifications as an Indian organization or Indian-owned enterprise.

24 C.F.R. § 805.204 sets forth the HUD regulations regarding Indian preference. Section 805.204(a)(3) provides:

> A prospective contractor seeking to qualify as an Indian Organization or Indian-owned Enterprise shall *submit with or prior to* submission of his bid or proposal:
>
> (i) Evidence showing fully the extent of Indian ownership and interest.
>
> (ii) Evidence of structure, management and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; material or equipment supply arrangements; and management, salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest.
>
> (iii) Evidence sufficient to demonstrate to the satisfaction of the IHA and HUD that the prospective contractor has the technical, administrative and financial capability to perform contract work of the size and type involved within the time provided under the proposed contract * * *. [Italic supplied.]

HUD reports that the Board of Commissioners of the ZHA, after reviewing Bradley's prequalification package, determined from the documents submitted that Bradley did not have the technical, administrative and financial capacity to perform the work of the size and type involved and within the time provided under the proposed contract. HUD contends that the record shows that the ZHA's evaluation of Bradley's prequalification package was in accordance with established criteria and was based on the reasoned judgment of the ZHA Board of Commissioners.

HUD contends that the review of the prequalification statement is analogous to a responsibility determination. Bradley, following up on this argument, contends that since its qualifications were a question of responsibility it should have been determined after bid opening in accordance with Federal Procurement Regulations (FPR) § 1-1.1205-2 (1964 ed.) (Second Amendment, August 1971). Bradley further argues that the ZHA's decision to disqualify its firm based on issues of responsibility was unreasonable.

Initially, we point out that since an IHA procurement is involved rather than a direct Federal procurement, the FPR's are not applicable. Further, although we agree that the review of the prequalification package was analogous to a nonresponsibility determination, the review was made not for the purpose of determining a prospective contractor's capability to perform a contract but for the purpose of determining whether Bradley was eligible for Indian preference pursuant to HUD regulations. Under that regulation IHA is permitted to require such information prior to the submission of bids as was, therefore, properly done here.

With regard to the reasonableness of that determination, we believe the following principles are applicable. In direct Federal procurements we have held that a procuring agency has broad discretion in making responsibility determinations. Deciding a prospective contractor's probable ability to perform a contract involves a forecast which must of necessity be a matter of judgment. Such judgment should be based on fact and reached in good faith. However, it is only proper that it be left largely to the sound administrative discretion of the contracting agency involved. The agency logically is in the best position to assess responsibility, must bear the major brunt of any difficulties experienced in obtaining required performance, and must maintain day-to-day relations with the contractor. 43 Comp. Gen. 228 (1963). Thus, we will not disturb an agency determination of nonresponsibility unless it lacks a reasonable basis. See *The Mark Twain Hotel,* B-205034, October 28, 1981, 81-2 CPD 361.

In our view, the ZHA had a reasonable basis for its determination that Bradley was not qualified to perform the work called for in the IFB based upon the information furnished by Bradley on November 25, 1981, which failed to show that the firm had performed work of the size involved here. In 7 years, Bradley had received

only one contract of this magnitude, which it was currently completing. Further, additional information submitted by Bradley during the course of its appeals to the ZHA and HUD in support of its qualifications is not germane. It was the obligation of Bradley to submit with its prequalification package all information available to support its qualifications. At the time of the determination by the ZHA, the only evidence submitted by Bradley bearing on its qualifications was considered and reasonably determined inadequate.

In view of our conclusion that Bradley's bid was properly rejected under the first solicitation and it was not the low bidder under the second solicitation, we find it unnecessary to consider Bradley's allegations concerning what it characterizes as "Inferences of Fraud, Gross Mismanagement of Abuse," such as the failure of HUD to cancel the resolicitation and an alleged change in the cost limitation applicable to the procurement.

We deny Bradley's complaint.

[B-174839]

Vessels—Charters—Long-Term—Obligational Availability—Navy Industrial Fund—Anti-Deficiency Act Compliance

The Antideficiency Act, 31 U.S.C. 1431, would not prevent the Navy from entering into the TAKX long-term ship leasing program, to be financed through the Navy Industrial Fund, so long as the unobligated balance of the Fund is sufficient to cover the Government's obligation until commencement of the lease period. Navy may not, through acceptance of vessel delivery, agree to commencement of the lease arrangement if the obligational availability of the Fund is at that time insufficient to cover any consequential increase in the Government's obligation.

Vessels—Charters—Long-Term—Obligational Availability—Navy Industrial Fund—Termination Expenses

Under the Navy's TAKX ship leasing program, ship charters will cover a base period of 5 years, renewable up to 20 years at 5-year intervals, and with substantial termination costs for failure to renew. Such contracts, once in effect, should be recorded as firm obligations of the Navy Industrial Fund at an amount sufficient to cover lease costs for the 5-year base period, plus any termination expenses for failure to renew.

Matter of: Navy Industrial Fund: Obligations in connection with long-term vessel charters, January 28, 1983:

By letter dated December 2, 1982, the Comptroller of the Navy requested our opinion as to the proper manner in which to record certain obligations of the Navy Industrial Fund, in connection with two Military Sealift Command programs to build/convert and charter TAKX Maritime Prepositioning Ships and build and charter T-5 Tankers.

The question as originally presented related to the manner of recording termination expenses under the charter contracts. While we shall address that question below, it has become clear from our discussions with Navy officials that their principal concern is with

the total amount that should be presently recorded as a firm obligation of the Government under the TAKX program. As is explained in detail below, it is our view that the Navy must record the TAKX program as a firm obligation only to the extent of the Government's maximum potential liability prior to commencement of the initial lease period. Once the Navy, through acceptance of vessel delivery, agrees to commencement of the lease, it must record the TAKX charter agreements as firm obligations in an amount sufficient to cover lease costs for the base period, plus termination expenses.[1]

BACKGROUND

Under the TAKX program, vessels are constructed or converted to meet military requirements and are subsequently time-chartered to the Military Sealift Command. The program consists of 13 vessels, provided by three different contractors. The Navy enters into two different agreements with each contractor: an Agreement to Charter and a Charter Party. The Agreement to Charter binds the Government until it accepts delivery of the TAKX vessels (in about 2 years, we are told). The Charter Party is the actual charter agreement, setting out the rights and responsibilities of the various parties throughout the lease period. Although both contracts are signed at the same time, the Charter Party does not become effective until the "Commencement Date," the date of the Government's acceptance of delivery of the vessels.

Once effective, each Charter Party provides for an initial hire term of 5 years following the construction period, with options to renew for four consecutive 5-year periods. Failure to exercise such options subjects the Government to substantial termination expenses. The capital hire rate during the entire 25-year term of the initial and optional charter periods is computed to repay to the equity bondholders and the owners the full value of their investments, plus interest. The Government may terminate the charter at the end of any 6-month period after the initial 5-year base period, but is thereby subject to termination expenses. Termination expenses are calculated to pay the outstanding principal and interest on the bonds, and to return to the owners their investments plus a rate of return to the date of termination (the "termination value"), less the proceeds of any sale of the vessel (or insurance proceeds in the case of a loss).

The Navy's concerns about recording obligations under the TAKX program arise from the fact that current available resources

[1] We do not here address the more fundamental question of whether the Navy Industrial Fund is a proper source for funding such long-term lease arrangements. As we approved the use of the Fund to finance similar contracts in our decision 51 Comp. Gen. 598 (1972), we would not object to the TAKX program on that basis. Nonetheless, this issue will be reexamined by this Office in an upcoming in-depth review of the practice of obligating the Federal Government for multi-billion dollar programs such as the TAKX Prepositioning Ship Program through the use of Industrial funds. *See* H.R. Rep. No. 943, 97th Cong., 2nd Sess. 48-49 (1982). Similarly, we do not here address the wisdom of long-term leasing, as opposed to purchase, of TAKX vessels.

of the Navy Industrial Fund are sufficient to cover only about $2.2 billion of new obligations. Thus, if the Navy must record firm obligations for the 13-ship TAKX program in excess of that amount, it would be necessary to scale-back the program to avoid a violation of the Antideficiency Act. The Antideficiency Act provides that:

> An officer or employee of the United States Government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either Government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1), recodified from 31 U.S.C. § 665(a) (1976).

DISCUSSION

I. Current TAKX Program Obligations

As indicated above, two contracts govern the Navy's obligation under the TAKX program. The first, the Agreement to Charter, is effective upon its signing: it obligates the Navy to accept delivery of vessels conforming to the specifications of the contract. Although the Navy may terminate for convenience at any time prior to accepting delivery, it would be required to pay any amount of basic capitalized costs incurred by the Shipowner up to the date of termination. The second contract, by comparison, is entirely contingent upon completion of the first. The Navy's obligation under the Charter Party agreement does not commence until it has accepted delivery of the TAKX vessels. Termination of the Agreement to Charter would simultaneously terminate the Charter Party, with no additional liability on the part of the Government.

Because the Navy's obligation under the Charter Party will not commence until it has accepted delivery of the TAKX vessels, it is our view that the Navy is not required to record a firm obligation under that contract until the contract becomes effective. Nevertheless, until the vessels are delivered there is, through the Agreement to Charter, a contingent liability, based on the possibility that the Government will in fact be bound by the Charter Party. That potential liability, however, is limited by the Navy's own power to terminate the Agreement to Charter at any time prior to delivery. In our opinion, therefore, the Navy should record an obligation in an amount sufficient to cover its maximum potential liability prior to acceptance of the TAKX vessels. As we have been informed by the Navy that the current unobligated balance of the Navy Industrial Fund is sufficient to cover this obligation for all 13 TAKX vessels, we do not consider the Antideficiency Act to be a bar to the Navy's present program. We would caution, however, that once the delivery of vessels is accepted by the Navy, any new obligation, based on the terms of the Charter Party, may not exceed the unobligated balance of the Fund at that time.

II. Recording of Charter Party Obligations

As mentioned above, the question initially raised by the Navy related to the manner in which Charter Party termination expenses should be considered for purposes of recording obligations of the Navy Industrial Fund. While Charter Party obligations need not be recorded until the Navy accepts delivery of the TAKX vessels, there is some concern on the part of Navy officials that the unobligated balance of the Navy Industrial Fund may at that time be insufficient to cover all obligations, particularly if the Navy is required to include charter termination expenses. To avoid overobligating the Fund, the Navy has proposed to record as firm obligations under TAKX Charter Parties only the lease amounts due during the 5-year base period. Any additional expenses (*i.e.* termination costs after the base period) would not be recorded as firm obligations, but would be treated as contingent liabilities, shown as footnotes to the financial records of the Fund.

The Navy has argued that its proposed treatment of TAKX Charter Party termination expenses is consistent with title 2, section 13 of our *Policy and Procedures Manual for Guidance of Federal Agencies,* which describes the types of liabilities to be recorded as obligations. Subsection 13.2 of the Manual provides that contingent liabilities need be recorded as expenses only to the extent it is probable that a liability will be incurred and its amount reasonably estimated. Otherwise, as is indicated in our decision 37 Comp. Gen. 691, 692 (1958), contingent liabilities may be shown as footnotes to the appropriate financial statements.

Having examined the contracts in question and the proposed treatment of termination expenses, we cannot agree that those expenses may be shown as footnote items. We recognize that these specific expenses are technically "contingent" in that they will arise only upon the happening of one of several events (for example, failure to renew, termination for convenience of the Government, or loss after delivery). If none of the contingent events arises, however, the Government will have a substantial alternative obligation. A principal example would be the continuation of the charter through the Navy's exercise of the renewal option. Renewal by the Navy would at that time create a new obligation to pay lease costs for the second 5-year period, plus termination expenses (unless, of course, the second renewal option was in turn taken). This process of replacing one obligation with another would continue throughout the full 25-year period, with the unliquidated obligation at each renewal period (*i.e.* the termination cost) being replaced by that created by continuation of the contract.

It is probable from the nature of these contracts that the Navy will choose to renew at each 5-year period. Nonetheless, any new obligation created by continuation of the contract will in fact exceed termination expenses after the 5-year base period. Whether the

contract is continued only for one additional 5-year period (including termination costs) or up to the full 25 year lease term of the charter (at a cost over that period of about $13 billion, we are told), the total expense to the Government of continuing the lease past the initial base period will be more costly than termination. It is our view, therefore, that each Charter Party, once in effect, should be recorded as a firm obligation to pay lease costs for a 5-year base period, plus termination costs after that time. This would represent the least amount for which the Government will be liable under the contract. *See* 48 Comp. Gen. 497, 502 (1969), in which we stated in the context of revolving funds that we would have no objection to contracting for a basic period with renewal options, provided that funds were obligated to cover the cost of the basic period, plus any charges payable for failure to exercise the options.[2]

Based on the above, it appears that the Navy may be precluded from accepting delivery of (and thereby chartering) all 13 ships under the TAKX program, unless the obligational availability of the Navy Industrial Fund is increased in some manner. There are several ways that this might be accomplished. One would be by the direct infusion of funds through appropriations, or by transfers from other Defense Department accounts. Another way would be through enactment of specific "contract authority" for this program (specific authority to contract in excess or advance of appropriations). *See, e.g.*, 56 Comp. Gen. 437, 444 (1977). Finally, the Navy might ask the Congress for specific statutory authority, at least for this particular program, to include anticipated reimbursements from future orders as budgetary resources of the Navy Industrial Fund. The Department of Defense has previously stated that it already has such authority with respect to its Industrial funds. We do not share this view. See our report "The Air Force has Incurred Numerous Overobligations in its Industrial Fund," AFMD-81-53, App. III, August 14, 1981.

CONCLUSION

Based on the foregoing, we have no legal objection to the Navy's TAKX program, so long as current obligational availability of the Navy Industrial Fund is sufficient to cover the Government's present obligation, that is, until the Navy, through acceptance of vessel delivery, agrees to the commencement of TAKX leases. Once TAKX charter agreements become effective, the Navy must record

[2] In 51 Comp. Gen. 598, 604 (1972), we sanctioned an arrangement very similar to the present one, and in so doing, distinguished 48 Comp. Gen. 497 (1960). Our 1972 decision, however, did not reflect a different view of the types of commitments that must be recorded at the time that a contract becomes effective. Instead, we distinguished 48 Comp. Gen. 497 (1960) on the basis that the Navy had no need to rely solely on cash reserves of the Navy Industrial Fund in order to cover its obligations under the lease program. In 1972 we were persuaded that sufficient budgetary resources were available to cover all obligations under the program through exercise of the Navy's authority to transfer funds from other sub-accounts of the Navy Industrial Fund, or from other working capital funds. In the present case, however, the Navy is unable to assure us that it would be able to cover all TAKX Charter Party obligations in this manner.

such agreements as firm obligations of the Fund to the extent of lease costs for the 5-year base period, plus any termination expenses for failure to renew. The obligational availability of the Fund must at that time be sufficient to cover any increase in the Government's obligation by reason of commencement of the lease period.

[B-208701]

Bids—Late—Hand Carried Delay—Commercial Carrier—Failure to Deliver to Designated Office

Government did not frustrate carrier's ability to deliver bid package where commerical carrier that contracted with protester to deliver bid to office designated in the solicitation instead asked an agency employee—who was not affiliated with the contracting activity—to deliver an unmarked package containing protester's bid. 57 Comp. Gen. 119 and B-202141, June 9, 1981, are distinguished.

Bids—Late—Mishandling Determination—Improper Government Action—Not Primary Cause of Late Receipt—Hand Carried Delay

Where carrier for its own convenience gives an unmarked package containing protester's bid to an agency employee rather than delivering it to the proper office, subsequent misrouting of bid by another agency employee was not the paramount reason for the late arrival of the bid at the contracting office and bid was properly rejected.

Matter of: Visar Company, Inc., January 31, 1983:

Visar Company, Inc. protests the refusal of the Department of the Army, Corps of Engineers, to consider its bid under invitation for bids (IFB) No. DACW57-82-B-0094. Visar contends that its bid was received after the time set for bid opening because a Corps employee frustrated its carrier's ability to deliver the bid. Alternatively, Visar contends that the Corps mishandled the bid after its timely receipt at the Government installation. For the reasons that follow, we deny the protest.

The solicitation, for miscellaneous earthwork construction, was issued on June 18, 1982, and called for bid opening at 2 p.m., July 22. It contained the standard clauses regarding the conditions under which a late bid would be considered. It also stated that hand-carried bids should be left in the depository in Room G-12 of the Multnomah Building, 319 S.W. Pine Street, Portland, Oregon.

When bids were opened as scheduled on July 22, E. W. Eldridge, Inc. was the apparent low bidder at $244,300. Visar's bid of $226,556.50 would have been low but for the fact it was not received in the contracting office until 8:50 on the morning of July 23. The contracting officer determined that under the circumstances the solicitation provisions that permit consideration of late bids would not apply to Visar's bid. Therefore, by letter of July 26, the Corps informed Visar that its bid would not be considered. Visar protested this determination to the Corps but prior to the

agency's resolution of the matter, Visar filed a protest with this Office.

Visar sent its bid via Greyhound Bus Lines. It paid Greyhound a special fee to deliver the bid to the Corps' offices. The bid arrived at the Greyhound terminal in Portland early in the morning on July 22. Sometime between the hours of 9 and 10 a.m., a cartographic aide in the Corps' photogrammetry section was sent to the Greyhound terminal to pick up several packages that had arrived at the terminal destined for that section. At the same time, under circumstances more fully discussed below, she picked up Visar's bid and returned it along with the other packages to her supervisor in the photogrammetry section.

Visar contends that the Corps' employee volunteered to deliver its bid to the Corps' offices and that in doing so she assumed Greyhound's duty to deliver the bid in time for bid opening. It argues that she failed to do so, and this failure frustrated Greyhound's attempt to deliver the bid. Visar further contends that this failure amounts to improper Government action that justifies consideration of its bid.

The employee states in an affidavit that the Greyhound clerk asked her if she would deliver a package, without informing her that the plain, unmarked Greyhound envelope (which was later destroyed and is not available) she was given contained Visar's bid. The agency argues that Greyhound acted unreasonably in giving the bid to the employee rather than delivering the bid itself. Since the protester has offered no evidence refuting the Corps' version and, in fact, has elected not to comment at all on the Corps' report submitted to our Office in connection with this protest, we will accept the agency's account. See *Nielson, Maxwell & Wangsgard*, 61 Comp. Gen. 370 (1982), 82-1 CPD 381.

The Corps concedes that Visar's bid was delivered to the photogrammetry section in the Corps' office 4 hours before bid opening and was recognized by the supervisor of that section and misrouted by him within the internal mail system. The agency notes that neither the employee who delivered the bid nor her supervisor had any expertise in procurement matters or much contact with the Corps' contracting branch. The Corps states that the misrouting of the bid was not the paramount reason for its late receipt, but rather the paramount reason was Greyhound's failure to deliver the bid.

We disagree with Visar's contention that the Corps frustrated Greyhound's ability to deliver the bid and we agree with the agency the paramount reason for the delay in receipt of Visar's bid was Greyhound's failure to deliver the bid.

Late bids delivered by commercial carriers are not to be considered under the late bid provision contained in Defense Acquisition Regulation § 7-2002.2 and the "Late Bid" clause in the solicitation, both of which allow consideration of a late bid sent by mail if late-

ness is due to Government mishandling after it has been received. See *Scot, Incorporated,* 57 Comp. Gen. 119 (1977), 77-2 CPD 425. A late hand-carried bid, or as in this case, a late bid delivered by a commercial carrier, may, however, be considered where lateness is due to improper action of the Government and where consideration of the late bid would not compromise the competitive procurement system. On the other hand, such a late bid should not be accepted if the bidder significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility of delivering the bid to the proper place by the proper time, even though lateness may be in part caused by erroneous Government action or advice. *Empire Mechanical Contractors, Inc.,* B-202141, June 9, 1981, 81-1 CPD 471. For a late hand-carried bid to be considered, it must be shown that wrongful Government action was the sole or paramount cause of late receipt.

In cases where we have permitted late hand-carried bids to be considered, there was some affirmative action on the Government's part, such as improper or conflicting delivery instructions, that made it impossible for the hand-carried bid to be timely delivered to the bid opening location. See, for example, *Scot, Incorporated, supra; Empire Mechanical Contractors, Inc., supra.*

Here, the carrier for its own convenience solicited the Corps' employee's services to deliver an unmarked package, even though it should have been aware that the package contained Visar's bid, and despite the fact that it had received a special fee to deliver the package to the contracting office. The employee's agreement to deliver the bid did not amount to affirmative action on the Government's part that frustrated Greyhound's ability to deliver the bid. This is especially so since the employee was not a representative of the contracting officer and she did all that could reasonably have been expected of her when she turned the unmarked package over to her supervisor.

Regarding the misrouting of Visar's bid in the Corps' internal mailing system—the supervisor concededly misaddressed the bid—we do not believe that this was the paramount cause for the late receipt of Visar's bid. Where a bidder (or as in this case its agent) significantly contributes to the late receipt of a bid by acting unreasonably in fulfilling its responsibilities, any subsequent mishandling by the Government is clearly not the paramount reason for the bid's late receipt. See *Ferrotherm Company,* B-203288, September 1, 1981, 81-2 CPD 194. In this connection, we note that there is some doubt that the bid would have been delivered to the contracting office in the normal course of events by the Corps' internal mailing system in time for bid opening even if it had been properly addressed by the Corps' employee after it arrived in the photogrammetry section.

In our view, Greyhound acted unreasonably in giving the unmarked package to a Corps' employee who had no official relation-

ship with the contracting officer. This act initiated a series of events that culminated in the bid arriving late at the contracting office. Under the circumstances, the late arrival was not caused by improper Government action and the bid therefore was properly rejected.

The protest is denied.

[B-209414]

Compensation—Periodic Step-Increases—Waiting Period Commencement—Repromotion—During Period of Grade Retention—Civil Service Reform Act of 1978

Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay* retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information submitted, by 63 Comp. Gen.———. (B-209141, Dec. 7, 1983).

Matter of: Eric E. Bahl—General Schedule Within-Grade Increase—Grade Retention—Repromotion to Prior Position After Demotion, January 31, 1983:

This decision is in response to a letter dated October 1, 1982, from Mr. Gary W. Divine, President, Local 29, National Federation of Federal Employees, requesting a decision pursuant to the provisions of 4 C.F.R. § 22 (1982), on behalf of Mr. Eric E. Bahl, a civilian employee of the United States Army Corps of Engineers, Kansas City, Missouri. The Corps of Engineers was served, as required by 4 C.F.R. § 22.4 (1982), on October 4, 1982, but has not responded to the claimant's request for a decision.

Mr. Bahl, a General Schedule employee, requests that this Office retroactively award him a within-grade increase under the provisions of 5 U.S.C. § 5335 (Supp. IV 1980), based on credit toward a within-grade increase for the time period during which he was demoted to a lower grade while receiving a grade retention. Thus, the issue we are asked to consider is whether an employee's repromotion to his former position, occurring during the 2-year grade retention period of 5 U.S.C. § 5632 (Supp. IV 1980), is an "equivalent increase" under 5 U.S.C. § 5335(a) (Supp. IV 1980), and 5 C.F.R. § 531.403 (1982), so as to require a new waiting period for his periodic step increases beginning as of the date of repromotion.

Pursuant to the provisions of Title VIII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111, 1218-1220, 5 U.S.C. §§ 5361-5366 (Supp. IV 1980), and the regulations at 5 C.F.R. Part 531 (1982), we hold that the repromotion of a General Schedule employee under the circumstances described does not constitute

an equivalent increase. Therefore, Mr. Bahl is entitled to be retroactively awarded a within-grade increase based on his original schedule. The date of his restoration to his former position is irrelevant for purposes of computing within-grade increases in his case.

The facts are as follows. Mr. Bahl was promoted to step 1 of grade GS-11 when he was transferred to the Army Real Estate Agency in Europe in June 1975. Due to subsequent pay adjustments and within-grade increases, Mr. Bahl had attained step 4 of grade GS-11 in June 1978. Had Mr. Bahl remained in that position and grade, his next two within-grade increases would have occurred in June 1980 and June 1982. However, on July 1, 1980, Mr. Bahl was demoted to grade GS-9 when he was transferred back to Kansas City. Concurrently, he received a within-grade increase to step 5 of his former grade. Because Mr. Bahl qualified under the provisions of 5 U.S.C. § 5362 (Supp. IV 1980), he was afforded grade retention at that time, and, hence, for pay administration purposes, his grade remained the same (grade GS-11, step 5). In November 1980, Mr. Bahl was repromoted to his former position at grade GS-11, step 5.

In light of Mr. Bahl's repromotion in November 1980, the Acting Personnel Officer of the Department of the Army Corps of Engineers, Kansas City District, denied Mr. Bahl's request for a retroactive within-grade increase effective on or about July 1, 1982, stating that it was not due until November 1982, and citing 42 Comp. Gen. 702 (1963). Mr. Bahl maintains that the Department wrongfully withheld his within-grade increase; that the Comptroller General decision cited by the Department is no longer valid under recent statutes and regulations; and that he should be retroactively awarded all monies and interest due to him as a result of the within-grade denial.

Grade retention following a change of positions is governed by section 5362 of Title 5, United States Code (Supp. IV 1980). That section provides that "[a]ny employee * * * whose position has been reduced in grade is entitled * * * to have the grade of such position before reduction be treated as the retained grade of such employee for the 2-year period beginning on the date of the reduction in grade." 5 U.S.C. § 5362(b)(1) (Supp. IV 1980). It further provides that, for the 2-year period, the retained grade "shall be treated as the grade of the employee's position for all purposes (including pay and pay administration * * *)." 5 U.S.C. § 5362(c). *Grade* retention under section 5362 is to be distinguished from *pay* retention under section 5363 of Title 5, U.S. Code another new provision added by the Civil Service Reform Act of 1978.

Section 5335(a) of Title 5, U.S. Code (Supp. IV 1980), provides that an employee is eligible for periodic step increases in pay upon completion of 104 calendar weeks of service in pay rates 4, 5, and 6, as long as the employee did not receive an "equivalent increase" in pay from any cause during that period.

In two cases arising before the Civil Service Reform Act of 1978, *Richard C. Dunn,* B-193394, March 23, 1979, and *Duane E. Tucker,* B-193336, March 23, 1979, we held that, after a demotion with retained pay and a later repromotion to the employee's former grade and step, the employee must begin a new waiting period upon repromotion without counting service at the grade and step before the demotion as part of the new waiting period. The *Dunn* and *Tucker* cases followed the rule formulated under the statutory provisions in effect before the Civil Service Reform Act of 1978. See 43 Comp. Gen. 701 (1964); 43 *id.* 507 (1964); 42 *id.* 702 (1963). However, that rule is inapplicable to a repromotion during a period of *grade* retention as defined by Title VIII of the Civil Service Reform Act.

Congress provided that the retained grade of an employee is to be treated as the grade of the employee's position for *all* purposes during the 2-year period. Those purposes include pay and pay administration, retirement, life insurance, eligibility for training, promotion and reassignment, and other employee benefits. 5 U.S.C. § 5362(c) (Supp. IV 1980). Although Congress articulated several exceptions to the rule, the facts of this case do not conform to any of the situations in which an employee's assigned grade, rather than his retained grade, is to be used. See 5 U.S.C. § 5362(c)(1)–(4) (Supp. IV 1980); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 63–64 (1978).

This interpretation of the Civil Service Reform Act is consistent with the Office of Personnel Management regulations governing within-grade increases. See 5 C.F.R. Part 531 (1982). We agree with Mr. Bahl that the definition of "equivalent increase," as set forth in 5 C.F.R. § 531.403 (1982), does not include repromotion while in the same retained grade status under 5 U.S.C. § 5362. Since an employee's retained grade is to be used for purposes of pay and pay administration during the 2-year period, under 5 U.S.C. § 5362(c), the employee remains entitled to within-grade increases otherwise due during that period without regard to the demotion. Hence, a repromotion to the former position during that period does not represent an equivalent increase under 5 C.F.R. § 531.403 (1982); therefore, a new waiting period does not commence.

On the basis of the relevant statutory and regulatory provisions, the repromotion of Mr. Bahl to his former position during the period of grade retention did not constitute an equivalent increase, and did not require the commencement of a new waiting period for within-grade increases. The schedule established by his last within-grade increase, on or about July 1, 1980, applies, and Mr. Bahl is entitled to be retroactively awarded the within-grade increase due him on or about July 1, 1982.

[B-209612]

Buy American Act—Domestic or Foreign Product—Country of Manufacture—Alternative Statement—Slash (/) Virgule Usage

Bid stating that country of manufacture is "USA/England" was correctly evaluated as offering foreign end product for purposes of applying Buy American Act because the bid can reasonably be construed to permit the bidder to furnish either a domestic or a foreign product in the event of award.

Matter of: Airpro Equipment Inc., January 31, 1983:

Airpro Equipment Inc. protests the evaluation of its bid in response to line item 3 of Invitation for Bids (IFB) R6-82-272S, issued by the Forest Service for an industrial loader backhoe tractor. Airpro argues that its bid was improperly evaluated as foreign for purposes of applying the six percent Buy American preference. Airpro states that similar equipment has been purchased in the past by the Government, including the Forest Service, and should be considered domestic. The parties agree that Airpro would have been in line for award had the six percent differential not been added. We deny the protest.

The IFB Bid Schedule required that bidders identify the country of manufacture of the equipment offered. It also included the standard Buy American Certificate (Standard Form (SF) 33, p. 2) and clause (SF 32 para. 14) implementing the Buy American Act (41 U.S.C. §§ 10a-d (1976)). Airpro left its Buy American Certificate blank which action, without more, would have bound Airpro to furnish a domestic product and would have required its bid to be evaluated as offering a domestic product. See *Lanier Business Products, Inc.*, B-196736, March 10, 1981, 81-1 CPD 186. However, Airpro identified the country of manufacture on its schedule as "USA/England." The Forest Service determined that Airpro's use of the virgule (/) implied that the country of manufacture could be the United States *or* England, and relying on our decision in *Trail Equipment Company,* B-205026, January 27, 1982, 82-1 CPD 63, concluded that the product offered had to be evaluated as foreign.

Although Airpro challenges the Forest Service's interpretation of its bid, contending that it honestly filled out the bid documents as it did because a portion of the manufacture of the equipment is done in England, we believe Airpro's choice of language must be construed as permitting it to furnish either a domestic or a foreign product in event of award. We have examined a number of authorities in attempting to define the meaning of the virgule, which is alternatively referred to as a "diagonal" (*Webster's New Collegiate Dictionary* 314 (G. & C. Merriam Co. 1975)), solidus or slash (*The American Heritage Dictionary* 1303, 1431 (Houghton Mifflin Co. 1969)). These authorities recognize that at least one common use of the virgule is as a conjunction to join two alternative words or phrases. See also *Webster's New International Dictionary* 2848 (G. & C. Merriam Co. 1952). In this sense, therefore, Airpro's use of the

phrase "USA/England" as the country of manufacture implies that the equipment might be manufactured in the United States *or* in England.

In the circumstances, we view our decision in *Trail Equipment Company, supra,* as controlling. There, we considered a bid which identified a product as manufactured in the "USA or France." There, as here, the Buy American Certificate was left blank. In light of the alternative statement of country of manufacture, we concluded that the bid, although responsive, was to be treated as foreign for purposes of applying the six percent differential.

With respect to Airpro's assertion that similar equipment has been purchased in the past, we point out that the Buy American Act does not prevent the purchase of a foreign product if, applying the differential, that product remains the least costly product offered. Moreover, application of the differential depends upon whether Airpro in its bid obligated itself to furnish a domestic product. As a bidder, Airpro bore the responsibility of assuring that its bid was free of ambiguity. Any uncertainty in its bid must be construed against it since it cannot be permitted to explain or thereby alter its bid after bids have been opened. See *Trail Equipment Company, supra.* Accordingly, the differential was properly applied in evaluating Airpro's bid.

The protest is denied.

[B-206107]

Pay—Retired—Computation—Pub. L. 96-342—Pay Base Establishment—Erroneous Payments' Exclusion

Erroneous payments of basic pay should not be included in the computation of a service member's retired pay base for purposes of computing his retired pay entitlement under 10 U.S.C. 1407. Although that statute provides that retired pay base will be computed on basic pay "received" over a period of months of active duty, that is construed to mean only basic pay the member was legally entitled to receive.

Pay—Retired—Computation—Pub. L. 96-342—Pay Base Establishment—Forfeitures and Demotions' Effect

A service member's retired pay base, upon which his retired pay is computed, is an average of basic pay he "received" on active duty over a period of months. Reductions in the basic pay received because of forfeitures and demotions must be included in computing the pay "received" to determine the retired pay base.

Pay—Service Credits—Absences Due to Misconduct, Etc.—Retired Pay Purposes—Pub. L. 96-342 Effect—Pay Base Computation

A period of unauthorized absence, for which a service member forfeits pay, generally should not be included in computing the member's retired pay base unless such period may also be included in the member's years of service and thus the percentage multiplier (2½ percent per year) used in computing retired pay.

Pay—Retired—Increases—Cost-Of-Living Increases—Adjustment of Retired Pay—Pub. L. 96-342

Cost-of-living adjustments to military retired pay under 10 U.S.C. 1401a(b) which are based on the periodic cost-of-living adjustments made in Civil Service annuities also apply to military retired pay computed on the new retired pay base system provided for by 10 U.S.C. 1407.

Pay—Retired—Increases—Cost-of-Living Increases—Partial Adjustments—Pub. L. 96-342

Partial cost-of-living adjustments under 10 U.S.C. 1401a(c) and (d) made in military retired pay when the member first becomes entitled to retired pay should be applied to military retired pay based on averaging of pay received under 10 U.S.C. 1407 as long as it is reasonably possible to do so. The partial cost-of-living adjustment provisions were enacted to apply to retired pay computed under the old system in which retired pay is based on a single specific rate of basic pay; however, there is no indication of legislative intent that they should not also be applied to retired pay computed under the new retired pay base system.

Pay—Retired—Computation—Pub. L. 96-342—"Saved Pay Rate" Under 10 U.S.C. 1401a(e)—Applicability

The provisions of 10 U.S.C. 1401a(e), applicable to computation of retired pay, allow the use of basic pay rates in effect on the day before the effective date of the rates of basic pay on which the member's retired pay would otherwise be based plus appropriate cost-of-living increases. This provision was enacted at a time when retired pay was computed only under the old system where it is based on a single specific rate of basic pay. However, there is no indication of legislative intent that it should not also apply to the new system of basing retired pay on average of pay received over a period of months. Therefore, as long as it may reasonably be applied under the new system, it should be applied when advantageous to the retired member.

Matter of: Airman First Class Edward H. Gallaher, USAF, Retired, February 1, 1983:

This action is in response to a request for decision from the Accounting and Finance Officer, Headquarters Air Force Accounting and Finance Center, Denver, Colorado, on several questions regarding the proper method of computing retired pay using the retired pay base required by the new provisions of 10 U.S.C. 1407. Particular reference is made to the proper retired pay entitlement of Airman First Class Edward H. Gallaher, USAF, retired. This matter has been assigned submission number DO-AF-1382 by the Department of Defense Military Pay and Allowance Committee.

Background

Airman Gallaher entered active duty in the Air Force as a staff sergeant (E-5) on November 21, 1980. On January 20, 1981, he was demoted to Airman First Class (E-3). On April 20, 1981, he was relieved from active duty in grade E-3 and placed on the Temporary Disability Retired List under the provisions of 10 U.S.C. 1202, with a disability rating of 50 percent. At the time of his placement on that list, he was credited with a total of 5 months of active service. His retired pay is to be computed under 10 U.S.C. 1401, Formula number 2.

Under 10 U.S.C. 1401, if Airman Gallaher had entered active duty on or before September 7, 1980, his retired pay would have been computed based on 50 percent of the rate of the monthly basic pay of an E-3, the pay to which he was entitled on the day before he was placed on the Temporary Disability Retired List. However, because he entered active duty after September 7, 1980, his retired pay is to be computed based on 50 percent of his retired pay base established under the new provisions of 10 U.S.C. 1407. Section 1407 was added, and various other retirement computation statutes were amended, in 1980 to authorize a new method of computing retired pay for members of the uniformed services by basing such pay on a percentage of a retired pay base. The retired pay base is the average basic pay the member received over 36 months, or in certain cases a lesser period of time. See Pub. Law 96-342, sec. 813, 94 Stat. 1100-1110.

Under 10 U.S.C. 1407(b)(1)(B), the retired pay base for a member such as Airman Gallaher who retired under 10 U.S.C. 1202 with less than 36 months' active duty is established by totaling the amount of basic pay he received while on active duty and dividing it by the number of months (including any fraction thereof), which the member served on active duty. In Airman Gallaher's case, such a computation method permitted him to include the pay he received as a Staff Sergeant (E-5) for part of the computation period. As a result, his retired pay rate was higher than it would have been had he retired prior to the change in method of computation

since under the old method his retired pay would have been computed based solely on the pay of the grade he held at the time of retirement (E-3).

Effect of Erroneous Basic Pay Payments

Because 10 U.S.C. 1407 provides for the use of the total amount of basic pay which the member "received," in computing the retired pay base, the finance officer questions whether an otherwise erroneous payment of basic pay the member "received" should be included. We hold that a member should not be credited with erroneous payments of basic pay for purpose of computing his retired pay base.

Section 1407 of title 10, United States Code, provides in part:

(a)(1) The retired pay or retainer pay of any person who first became a member of a uniformed service after September 7, 1980, is determined using the monthly retired pay base or monthly retainer pay base computed under this section. * * *

(b)(1) In the case of a member who is retired under section 1201 or 1202 of this title, the monthly retired pay base is—

(A) one thirty-sixth of the total amount of monthly basic pay which the member received for any 36 months (whether or not consecutive) of active duty as a member of a uniformed service; or

(B) in the case of a member who served on active duty for less than 36 months, the amount equal to the total amount of the basic pay which the member received during the period he served on active duty * * * divided by the number of months (including any fraction thereof) which he served on active duty.

As indicated, for computing the retired pay of service members who began their military careers on or prior to September 7, 1980, the monthly rate of basic pay to which they were entitled on the date of retirement generally is used. For those who began their military careers after September 7, 1980, the method was changed to use an average of the monthly basic pay "received" for the high 36 months the member served or in the case of a member whose period of service is less than 36 months, the average is based on the basic pay he "received" for the period actually served. This is somewhat similar to the high-three average used in computing annuities under the Civil Service retirement system. *Cf.* 5 U.S.C. 8331, definition (4).

No specific explanation is given in the House and Senate reports regarding the use of the word "received" as it relates to retired pay base computations. However, we do not think that Congress intended that erroneous amounts of basic pay received would be included in the computation. It is our view that the intention in enacting 10 U.S.C. 1407 is to change from the use of the basic pay rate in effect at retirement to an average of the basic pay the member was legally entitled to receive during the 36 months or lesser period, as applicable. Accordingly, only amounts which the member was legally entitled to receive should be included in the computation of the retired pay base.

Effect of Unauthorized Absences, Forfeitures and Demotions

The question is asked whether a service member's retired pay base is affected by such things as unauthorized absences, forfeitures or demotions which result in the member receiving less basic pay. In cases of forfeitures and demotions the reductions must be taken into account, but in cases of absences the reduction in pay received would not affect the retired pay base unless the period of absence is includable for retired pay computation.

A member serving on active duty is entitled to the basic pay authorized under 37 U.S.C. 203 and 1009, at the rate applicable to his grade and years of service at any one time. 37 U.S.C. 204. A demotion, like a promotion, entitles the member to a new rate of basic pay which must be taken into account when a member's total amount of basic pay is computed for retired pay base purposes. Likewise, diminishments of pay a member receives as a result of forfeitures imposed under the Uniform Code of Military Justice, 10 U.S.C. 801–940, should also be taken into account in establishing a member's total amount of basic pay for retired pay base purposes. Such a forfeiture of pay is a lawfully imposed reduction in the member's pay for the period covered by the penalty. Thus, the reduced pay becomes the basic pay which he received during that period.

As to unauthorized absences, under 37 U.S.C. 503 a member forfeits all pay for periods he is absent without leave unless the absence is excused as unavoidable. Enlisted members are generally required to make up lost time due to unauthorized absences to complete the term for which they were enlisted. 10 U.S.C. 972. Although there may be exceptions, generally members do not receive pay for periods of lost time nor are such periods generally creditable for percentage multiplier purposes in computing retired pay. See, for example, 39 Comp. Gen 844 (1960). In cases where lost time may not be included in the members retired pay multiplier computation, it should not be included in the retired pay base computation.

We note that unauthorized absence and resulting lost time was apparently not a factor in Airman Gallaher's case. Should a case arise which does not clearly fall within the general explanation above, it should be submitted here for decision on its particular facts.

Cost-of-Living Adjustments

The question also is asked, how cost-of-living adjustment under 10 U.S.C. 1401a are to be applied to retired pay which is computed based on a retired pay base under 10 U.S.C. 1407. We find that the cost-of-living adjustments authorized by 10 U.S.C. 1401a(b), (c), and (d) apply.

The basic provisions of 10 U.S.C. 1401a were enacted several years prior to the enactment of Public Law 96-342, which added 10 U.S.C. 1407, establishing the retired pay base system. As a result they were worded to be compatible with the system of computing retired pay on a specific single basic pay rate, the only system then in existence. The question now is whether and how do the provisions of 10 U.S.C. 1401a apply to retired pay computed on the new retired pay base.

Subsection (b) of 10 U.S.C. 1401a provides:

(b) Each time that an increase is made under section 8340(b) of title 5 in annuities paid under subchapter III of chapter 83 of such title, the Secretary of Defense shall at the same time increase the retired and retainer pay of members and former members of the armed forces by the same percent as the percentage by which annuities are increased under such section.

Under these provisions each time Civil Service annuities are increased under 5 U.S.C. 8340(b) based on increases in the Consumer Prices Index, the Secretary of Defense is to increase retired and retainer pay by the same percentage as the Civil Service annuities are increased. The language of this provision can be applied without complication to retired pay computed on a retired pay base. Also, we find nothing in the language of 10 U.S.C. 1407 or its legislative history to indicate that the cost-of-living increases authorized by section 1401a(b) were not meant to apply to retired pay computed on a retired pay base. Therefore, we find that these provisions apply to retired pay computed on a retired pay basic under 10 U.S.C. 1407 just as they apply to retired pay computed based on the rate of basic pay to which the member was entitled on the day before retirement.

Subsections (c) and (d) of 10 U.S.C. 1401a provide:

(c) Notwithstanding Subsection (b), if a member or former member of an armed force becomes entitled to retired pay or retainer pay based on rates of monthly basic pay prescribed by section 203 of title 37 that became effective after the last day of the month of the base index, his retired pay or retainer pay shall be increased on the effective date of the next adjustment of retired pay and retainer pay under subsection (b) only by the percent (adjusted to the nearest one-tenth of 1 percent) that the new base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

(d) If a member or former member of an armed force becomes entitled to retired pay or retainer pay on or after the effective date of an adjustment of retired pay and retainer pay under subsection (b) but before the effective date of the next increase in the rates of monthly basic pay prescribed by section 203 of title 37, his retired pay or retainer pay shall be increased, effective on the date he becomes entitled to that pay, by the present (adjusted to the nearest one-tenth of 1 percent) that the base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

Under section 1401a(c) only a partial cost-of-living increase in retired pay is granted when a member first becomes entitled to retired pay "based on rates of monthly basic pay" that became effective after the last day of the month of the base index used in com-

puting the cost-of-living increase under 10 U.S.C. 1401a(b). The partial increase is to be based on the percent that the new base index exceeds the index for the calendar month immediately before that in which the "rates of monthly basic pay on which his retired pay" is based became effective.

Under section 1401a(d) a partial cost-of-living increase is granted when a member becomes entitled to retired pay on or after the effective date of a cost-of-living increase under 10 U.S.C. 1401a(b) but before the effective date of the next increase in monthly basic pay. The partial increase is the percent that the base index exceeds the index for the calendar month immediately before that in which "the rates of monthly basic pay on which his retired pay" is based became effective.

The purpose of sections 1401a(c) and (d) is to limit the cost-of-living increase in retired pay to that portion of the increase which occurred since the last statutory increase in basic pay on which the member's retired pay is based. B–166335, June 4, 1969. That is, under section 1401a(c), if he retires after a basic pay increase but before the next retired pay cost-of-living increase, he receives only a partial increase when the next cost-of-living increase occurs rather than the full increase. Under section 1401a(d), if he retires after the retired pay cost-of-living increase but before the next basic pay increase, he receives an immediate partial cost-of-living increase rather than no increase until the next cost-of-living increase.

The language of sections 1401a(c) and (d) was designed for the system of basing retired pay on a single specific basic pay rate rather than retired pay based on the new retired pay base which is an average of pay received and may include numerous different sets of basic pay rates. However, we find no intent in the enactment of the retired pay base system to repeal or eliminate the partial increases under sections 1401a(c) and (d). Further, those sections were designed to apply in conjunction with the provisions of section 1401a(b) which clearly applies to retired pay computed on a retired pay base. Therefore, it is our view that sections 1401a(c) and (d) should also be applied to retired pay computed on a retired pay base if reasonably possible.

It appears that these provisions can reasonably be applied by disregarding the prior basic pay rates which were used in determining the retired pay base. Instead, in applying sections 1401a(c) and (d) the most recent basic pay rates should be used and the partial increase percentage determined in the same manner as used with respect to members retiring under the old system. This partial increase should then be applied at the appropriate time (depending upon whether (c) or (d) applies) to the member's actual retired pay base.

"Saved Pay" Rates

The submission also asks whether the so-called "saved pay rate" provisions of 10 U.S.C. 1401a(e) apply to the computation of retired pay computed on a retired pay base provided for by 10 U.S.C. 1407. Section 1401a(e) provides:

> (e) Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member or former member of an armed force retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay based on the same pay grade, years of service for pay, years of service for retired or retainer pay purposes, and percent of disability, if any, on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based.

When it is to the member's advantage in the computation of retired pay, 10 U.S.C. 1401a(e) authorizes the use of basic pay rates in effect on the day before the effective date of the rates of monthly basic pay on which the member's retired pay would otherwise be based, plus appropriate cost-of-living increases. 53 Comp. Gen. 698 and 53 *id.* 701 (1974). This provision was directed to retired pay based on a specific basic pay rate and not an average of basic pay received over a period of time. However, like sections 1401a(c) and (d), we find no clear indication that in enacting the retired pay base system, Congress intended that section 1401a(e) would not be applied. Thus, we find that when it is possible to do so and it results in a benefit to the retiree, section 1401a(e) should be applied to the computation of retired pay based on a retired pay base under 10 U.S.C. 1407. In Airman Gallaher's case, section 1401a(e) may be applied to allow the use of the pay rates in effect immediately prior to the rates in effect at the time he retired.

Conclusion

As the foregoing relates to Airman Gallaher, his initial retired pay base is obtained by totaling the basic pay he was legally entitled to receive while on active duty. This should reflect the change in his basic pay due to his January 20, 1981 demotion. That total is to be divided by the number of months of his total active duty time to arrive at his retired pay base. The 50 percent disability rating should then be applied to the retired pay base to determine his initial retired pay. However, from the computation furnished us by the Air Force it appears that it would be to Airman Gallaher's advantage to use the October 1979 pay rates (as authorized by section 1401a(e)) rather than the October 1980 pay rates. Therefore, his retired pay base should be computed using the 1979 rates, and all applicable cost-of-living increases authorized under 10 U.S.C. 1401a. The voucher submitted is being returned for payment, if otherwise correct.

Should the application of any of the provisions of subsections (c) through (e) of 10 U.S.C. 1401a to retired pay computed on a retired pay base be too cumbersome to implement or should their imple-

mentation be otherwise undersirable, we suggest the services seek clarifying legislation.

[B-207605]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Government Printing Office Contracts

The Government Printing Office is a legislative agency which is excluded from coverage of the Small Business Act. Therefore, its determination that a small business concern is nonresponsible need not be referred to the Small Business Administration for review under certificate of competency procedures.

Contractors—Responsibility—Administrative Determination—Security Clearance—Absence at Time of Contract Award

General Accounting Office will not disturb contracting agency's determination that a firm is nonresponsible where that determination is reasonably based on fact that firm did not have security clearances necessary to perform contract and could not obtain such security clearances in time to perform in an efficient and uninterrupted manner.

Matter of: Fry Communications, Inc., February 1, 1983:

Fry Communications, Inc. (Fry), protests the Government Printing Office's (GPO) determination that Fry was not responsible to perform the services required under invitation for bids No. A203-S, and the subsequent award of the contract to Braceland Brothers, Inc. Fry contends that GPO's finding of nonresponsibility was contrary to the terms of the invitation and applicable sections of the Federal Procurement Regulations (FPR). Fry further contends that, since it is a small business, GPO was required to refer the matter of its nonresponsibility to the Small Business Administration (SBA) for the possible issuance of a certificate of competency as required under the Small Business Act, 15 U.S.C. § 637(b)(7).

We find no merit to the protest.

The invitation was for printing and related services, including production of looseleaf pamphlets, reprints and changes. Under the resulting requirements contract, the contractor is to perform such operations as film processing, printing, binding, packing and distributing. The invitation stated that approximately 50 percent of the orders under the contract "will be classified up to 'Confidential' or 'NATO Confidential.' " The invitation further stated that:

> All provisions of the Security Agreement (DD Form 441) including the "Industrial Security Manual for Safeguarding Classified Information" (DoD 5220.22-M) are hereby made a part of these specifications and will be applicable to all phases of production and shipment of classified publications ordered under these specifications.

Bids were opened on April 27, 1982, and Fry submitted the lowest bid. The contracting officer subsequently contacted the Defense Investigative Service Cognizant Security Office (DISCO) to find out if Fry had been properly cleared under the Department of Defense Industrial Security Program to handle any classified material which would be released to the firm if awarded the contract. A

DISCO representative told the contracting officer that it would take at least 6 months for Fry to obtain the necessary clearance. (Subsequent to Fry's filing a protest in our Office, the contracting officer again contacted DISCO and was told Fry was not cleared and that, "Under the most ideally realistic conditions, it would normally take 60 to 90 days to clear a facility from the time of receipt of the request.") The DISCO representative further informed the contracting officer that because of the need for "NATO Confidential" clearance, an interim security clearance would not be issued. The contracting officer concluded that there was not sufficient time for Fry to obtain the proper clearance before performance had to start and, therefore, determined Fry to be nonresponsible and awarded to Braceland Brothers, Inc., on May 12.

Fry contends that, even though the contracting officer determined Fry to be nonresponsible, Fry's offer could not properly be rejected without referral of the responsibility issue to the SBA for review under its certificate of competency procedures. Fry cites FPR § 1-1.708-2 and the Small Business Act, 15 U.S.C. § 637(b)(7), as mandating such referral.

In accordance with section 501 of the Small Business Act Amendments of 1978, 15 U.S.C. § 637(b)(7) (Supp. IV, 1980), no small business concern may be precluded from award because of nonresponsibility without referral of the matter to SBA for final disposition under the certificate of competency procedures. Section 1-1.708-2 of the FPR (Amendment 192, June 1978) is the implementing regulation. Under 15 U.S.C. § 637, SBA has authority to make final determinations with regard to "all aspects of responsibility" of small business concerns. However, we conclude that the certificate of competency procedures are not applicable to GPO procurements. Before reaching this conclusion, we reviewed reports from both GPO and SBA, as well as submissions from the protester. In addition, the legal issue concerning whether GPO is subject to SBA's certificate of competency review was before the United States District Court for the District of Columbia (*Gray Graphics Corp.* v. *United States Government Printing Office, et al.,* Civil Action No. 82-2869, decided December 20, 1982) while we were considering this protest, and reviewed certain documents submitted to the court before deciding this case. The views of SBA, in particular, are entitled to significant weight because of its statutory responsibility to administer the certificate of competency program. See *System Development Corporation and International Business Machines,* B-204672, March 9, 1982, 82-1 CPD 218.

GPO contends that it is not a Government agency covered by the Small Business Act. GPO submits that agencies covered by the act are defined in section 3(b) of the act, 15 U.S.C. § 632(b), which incorporates the following definition of "agency" found in the Administrative Procedure Act at 5 U.S.C. § 551(1):

"agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, *but does not include*—
(A) *the Congress* * * *. [Italic supplied.]

Because GPO considers itself to be a congressional or legislative agency, GPO argues that it is excluded as an agency covered by the Small Business Act. GPO points to the legislative history of the Small Business Act amendments and, in particular, the language used by the Senate Committee on Governmental Affairs (quoted below) as a further indication that the act's definition of agency excludes agencies in the legislative branch of Government. S. Rep. No. 1140, 95th Cong., 2nd Sess. 12 (1978). Moreover, GPO refers to Senate Document No. 96-44 entitled "Handbook for Small Business, A Survey of Small Business Programs of the Federal Government" (1980, 4th ed.) as a clear indication of congressional intent to exclude GPO from Small Business Act coverage because the handbook does not include the GPO, or another legislative branch agency in its guide to agencies that administer Small Business Act Programs.

Fry argues that GPO is covered by the Small Business Act because nowhere in the Administrative Procedure Act or in the Small Business Act is GPO expressly exempted from the SBA's certificate of competency jurisdiction. Fry contends that, if Congress had intended to exclude "legislative-type agencies," it would have done so with specific language in the statute. Furthermore, Fry argues that the United States District Court for the District of Columbia has held that GPO is an agency within the meaning of the Administrative Procedure Act. *Estes* v. *Spence,* 338 F. Supp. 319 (D.C. 1972).

We note, as Fry points out, that GPO has been held to be an agency whose actions are subject to judicial review under the Administrative Procedure Act. *Estes* v. *Spence, supra.* Nevertheless, we do not think that Congress ever intended to make GPO subject to the Small Business Act. The legislative history of the Small Business Act indicates that Congress did not intend to include any legislative or judicial branch agency within the coverage of the Small Business Act. GPO, of course, is an agency within the legislative branch. See *United States* v. *Allison,* 91 U.S. 303 (1875).

Section 3(b) of the Small Business Act was added to the act by the 1978 Amendments, Pub. L. 95-507, 92 Stat. 1757, 1772, approved October 24, 1978, 15 U.S.C. § 637c(2). In explaining the wording of section 3(b), the Senate Committee on Governmental Affairs stated in Senate Report 95-1140, issued August 16, 1978, at page 12, that:

The Committee definition of "agency" excludes the United States Postal Service, the General Accounting Office, and agencies in the *legislative* and judicial branches. [Italic supplied.]

We recognize that GAO, which is also considered to be within the legislative branch of Government (See, for example, *Smithkline Corporation* v. *Staats,* 668 F.2d 201, 204 (3rd Cir. 1981)), is specifical-

ly exempted from the Small Business Act while GPO is not specifically exempted. However, this does not mean that Congress therefore wanted to exempt GAO and not other legislative branch agencies from the act's coverage. Rather, the specific exemption for GAO is explained by the fact that GAO is defined as an Executive agency for purposes of title 5, *see* 5 U.S.C. §§ 104 and 105, and thus could be considered subject to the Small Business Act unless there was a specific exemption.

The SBA has concluded that the Small Business Act was not intended to be applied to legislative agencies such as GPO, and the court in *Gray Graphics* gave deference to the SBA view of its own authority under that act. Based on the legislative history of the Small Business Act, we also conclude that GPO is not subject to the act.

We now consider Fry's contention that the contracting officer's determination that Fry was nonresponsible was improper because it was based upon the fact that Fry did not have the necessary security clearance at the time of contract award rather than at the time of performance. Fry cites FRP § 1–1.1203–1(b) (Amendment 192, June 1978) which requires only that the prospective contractor be able to comply with the proposed delivery schedule. Fry argues that it relied upon GPO's past practice of awarding similar contracts to contractors which did not have security clearances. Fry points out that there was no specific requirement for possessing a security clearance in the invitation. Fry also argues that since contract performance would extend over a 1-year period, there is sufficient time for obtaining any clearance if necessary.

The determination of a prospective contractor's responsibility—that is, its ability to perform the desired services or to deliver the required product in accord with the solicitation's delivery schedule and specifications—is primarily the function of the procuring activity and is necessarily a matter of judgment involving a considerable degree of discretion. Therefore, our Office will not disturb a determination of nonresponsibility absent a showing of either bad faith on the part of the procurement officials or the lack of a reasonable basis to support such a determination. *Lear Colorprint Corporation,* B–199523, October 6, 1980, 80–2 CPD 244.

Based on our discussion below, there is no showing of fraud of bad faith of the part of GPO officials. Moreover, we cannot conclude that there was no reasonable basis for the determination that Fry was nonresponsible. Therefore, this point of Fry's protest is without merit.

Concerning Fry's alleged reliance on past GPO awards to contractors without security clearances, GPO reports that it has always awarded contracts for the reproduction of classified material only to properly cleared contractors. Where, as here, the conflicting statements of the protester and the agency constitute the only available evidence of what really transpired in the past, the pro-

tester has not carried its burden of affirmatively proving the case. *Kassel Kitchen Equipment Co., Inc.,* B-190089, March 2, 1978, 78-1 CPD 162. Furthermore, even if GPO had been making awards in the past without regard to security clearances, those prior actions would not necessarily justify award without regard to security clearance in the present case since prior improper contract actions do not prevent an agency from applying correct procedures in later procurements. *SKS Group, Ltd.,* B-205871, June 14, 1982, 82-1 CPD 574.

In our opinion, the contracting officer's determination that Fry was nonresponsible had a reasonable basis. The solicitation clearly informed all offerors that half of the orders placed under the contract would involve classified material, that the Department of Defense "Industrial Security Manual for Safeguarding Classified Information" was incorporated and would be applicable to all phases of production and shipment of classified publications ordered under the contract, and that deliveries/pickups would have to be made by employees with proper security clearances. Thus, all offerors should have been aware that proper security clearance would be required of the contractor before performance could begin. Section 1-1.1203-1(b) of the FPR (Amendment 192, June 1978) specifically requires that, in order to be determined to be responsible, a prospective contractor must be able to comply with the required delivery or performance schedule. Here, after discussing the matter with DISCO officials, the contracting officer ascertained that Fry would not be able to obtain the necessary security clearance before orders pertaining to classified documents were placed under the contract. In fact, an order related to a "NATO Confidential" publication was placed only 9 days after contract award. We think that the failure of Fry to obtain the necessary clearance in these circumstances was relevant to Fry's ability to perform the contract in an efficient and uninterrupted manner. Since the burden is on the prospective contractor to demonstrate its ability to perform properly before being awarded a contract, we find nothing improper in the contracting officer's determination here. *See* B-167536, October 17, 1969; *What-Mac Contractors, Inc.,* 58 Comp. Gen. 767 (1979), 79-2 CPD 179; *see, also,* FPR § 1.1-1203 (Amendment 192, June 1978).

Accordingly, the protest is denied.

[B-208082]

Subsistence—Actual Expenses—Meals—Dinner—At Airport Prior To Return From TDY—Reimbursement Guidelines

An employee on temporary duty obtained a meal at the airport prior to his return flight. Although a traveler is ordinarily expected to eat dinner at his residence on evening of return from temporary duty, the determination of whether an employee should be reimbursed is for the agency. In determining whether it would be unreasonable to expect an employee to eat at home rather than en route, factors such as

elapsed time between meals and absence of in-flight meal service may be considered. B-189622, Mar. 24, 1978, is distinguished.

Certifying Officers—Submissions to Comptroller General—Items of $25 or Less

Claims amounting to $25 or less should normally be handled by certifying and disbursing officers under procedures authorized in letter of July 14, 1976, and need not be submitted to the Comptroller General for decision.

Matter of: Shawn H. Steinke, February 1, 1983:

By letter of June 24, 1982, an authorized certifying officer with the Department of Energy requested an advance decision regarding Mr. Shawn H. Steinke's claim for $13.40 for the cost of a meal obtained while returning from a temporary duty assignment. In addition, the certifying officer requests guidance concerning the types of situations in which it is appropriate to reimburse an employee for the cost of a meal obtained shortly after beginning or before completing temporary duty travel. The determination of whether an employee should be reimbursed for the cost of a meal obtained under these circumstances is to be made by the agency concerned. The General Accounting Office will not disturb an agency's determination unless it is clearly erroneous or arbitrary or capricious.

The record shows that Mr. Steinke returned to his duty station in Las Vegas, Nevada, from Los Alamos, New Mexico, on April 14, 1982. He left Los Alamos at 1:30 p.m. (Mountain Time) and traveled by car to Albuquerque, New Mexico. He ate dinner in Albuquerque before boarding a 6:15 flight to Las Vegas. There was no meal served on the flight. He arrived at his residence at 7:30 (8:30 Mountain Time).

Mr. Steinke's claim for dinner was previously disallowed by the certifying officer on the basis of our holding in *Matter of Simmons,* B-189622, March 24, 1978. That decision involved an employee who purchased dinner at the airport between 7 and 7:45 p.m. after his return flight and immediately before departing for his residence. He claimed reimbursement for the cost of that meal notwithstanding the general rule that subsistence expenses incurred by the traveler at his permanent duty station, his residence, en route to or from a nearby airport, or at the airport may not be reimbursed. In holding that he could not be reimbursed, we noted that the employee's "election to have dinner at the airport rather than at home was a purely personal choice, dictated at least in part by his preference as to time of eating. Therefore * * * the cost of this dinner was a personal expense. * * *." In that case, the employee had been served an in-flight lunch within 5 hours of the time he would have arrived home had he not delayed his return to dine at the airport.

Unlike *Simmons,* the case before us now involves the purchase of a meal prior to the return flight. This case is similar to *Matter of Stamnes,* B-202985, March 4, 1982, where the employee also pur-

chased a meal at the airport prior to his return flight. In these cases the primary consideration is the amount the employee's eating routine would have been interrupted had he taken his meal at home. As we noted in *Stamnes,* "the determination whether it would be unreasonable to expect the employee to eat dinner at home is a matter primarily for the agency concerned." In this particular case it is not clear that the official who approved Mr. Steinke's travel voucher considered the reasonableness of his decision to eat dinner before boarding the flight in Albuquerque. While the matter is returned to the Department of Energy for determination by the appropriate official, it would not appear improper to reimburse an employee for a meal en route to his duty station where the elapsed time between meals would otherwise have been more than 7½ hours. Although we would not ordinarily consider it unreasonable to expect an employee to eat dinner following his return home from temporary duty at 7:30 p.m., we believe it is appropriate to consider time zone changes and elapsed time between meals in determining whether the employee acted prudently in purchasing an evening meal en route home from a temporary duty assignment.

With regard to the certifying officer's request for general guidance in determining whether an employee should be reimbursed for a meal obtained in similar circumstances we again point out that this determination is a matter primarily for the agency concerned. As suggested in *Matter of Burrell,* B-195940, December 26, 1979, an employee is ordinarily expected to eat breakfast or dinner at his residence on the morning of departure for temporary duty, or on the evening of his return. However, the reasonableness of the employee's actions in doing otherwise depends on the particular facts of a given case. The considerations that would justify purchase of a dinner en route home are similar to those that might be found to warrrant the purchase of a substitute meal when an employee is provided an in-flight meal incident to his return transportation. See e.g., *Matter of Morrill,* B-192246, January 8, 1979; c.f. *Matter of Sestile,* B-194641, February 19, 1980.

Where the employing agency has made the initial reasonableness determination, this Office will overturn the agency's determination only where our review of the evidence results in a finding that the agency's determination was clearly erroneous, or arbitrary or capricious. *Matter of Virgne,* B-203857, December 15, 1981.

We have found that treatment of claims for minor amounts at the request of disbursing and certifying officers is an expensive and time consuming function which can appropriately be handled by the individual agency. Accordingly, on July 14, 1976, we issued a letter to the heads of departments and agencies, disbursing and certifying officers. That letter states as follows:

Under existing law disbursing officers and certifying officers may apply for and obtain a decision by the Comptroller General of the United States upon any ques-

tion involving a payment to be made by them or a payment on any voucher presented for certification. 31 U.S.C. 74, *id.* 82d.

In order to obtain the protection afforded by the cited statutory provisions numerous questions involving minor amounts are presented for decision by the Comptroller General. The General Accounting Office and the agencies involved incur inordinate administrative costs in processing these requests for decision and the necessity for dealing with them serves to delay attention to questions involving more significant amounts and subjects.

Therefore, in lieu of requesting a decision by the Comptroller General for items of $25 or less, disbursing and certifying officers may hereafter rely upon written advice from an agency official designated by the head of each department or agency. A copy of the document containing such advice should be attached to the voucher and the propriety of any such payment will be considered conclusive on the General Accounting Office in its settlement of the accounts involved.

We recognize that this claim was originally denied by the certifying officer and that upon appeal from that action the claim was submitted for advance decision because of the uncertainty as to whether the facts presented a justifiable reason for allowance. However, we reemphasize our position that in cases involving an item of $25 or less and, in order to avoid unnecessary requests for decisions in the future in such cases, the accounting officer should obtain a determination from the appropriate agency official in accordance with our letter of July 14, 1976. Such action normally should enable the accounting officer to settle the claim without a request for advance decision.

[B-208341]

Compensation—Severance Pay—Eligibility—Involuntary Separation Requirement—Resignation Incident to RIF—Cancellation of RIF Prior to Effective Date of Resignation

Federal Trade Commission (FTC) announced that it was closing several regional offices, and employees of these offices were given specific notice that their jobs would be abolished pursuant to a reduction-in-force (RIF). After several employees submitted written resignations, the FTC reversed its decision, did not close the regional offices, and canceled the RIF. The employees separated from service after the RIF was canceled. Hence, they are not entitled to severance pay since their resignations were voluntary and could have been withdrawn. Civil Service Regulations state that employees are not eligible for severance pay if at the date of separation they decline an offer of an equivalent position in their commuting area, and the option to remain in the same position is equally preclusive. 5 C.F.R. 550.701(b)(2).

Matter of: Ivan Orton, *et al.*—Severance Pay, February 1, 1983:

John H. Carley, General Counsel, of the Federal Trade Commission (FTC), requests our opinion concerning the entitlement to severance pay of several former employees of the FTC. The issue presented is whether employees who give notice of their intent to resign while under specific notice of a reduction-in-force (RIF), but whose resignations are not effective until after these RIF notices have been canceled, are entitled to severance pay. Our holding is that under these circumstances, the employees are not entitled to severance pay.

On April 16, 1982, the FTC decided to close four of its ten regional offices. On April 19 and 21, 1982, employees in the regional offices to be closed were given specific notice that their jobs would be abolished effective July 15, 1982. These employees were offered equivalent positions in Washington, D.C., and asked to accept or decline these offers within 30 days.

On May 27, 1982, the Senate passed H.R. 5922 a supplemental appropriation bill for 1982 which included language prohibiting the FTC from reducing the number of its regional offices. 128 *Cong. Rec.* S6342 (Daily ed. May 17, 1982, Part II). As a result of this congressional action, the reductions-in-force were canceled on May 28, 1982, and affected employees were notified through supervisory channels. It should be noted that, after Senate passage, the language prohibiting closure of FTC regional offices was deleted in the Conference Committee, with the specific notation that the FTC had agreed that the regional office reorganization would be delayed until fiscal year 1983 to allow fuller consideration by the Congress. H.R. Rep. No. 605, p. 24, 97th Cong., 2d Sess., June 10, 1982. Ultimately this bill was vetoed by the President on June 24, 1982.

Six employees of the FTC had given notice prior to the cancellation of the RIF of their intent to resign on effective dates after the cancellation of the RIF. Another employee accepted non-Federal employment while the notices were in effect, but did not give notice of his intent to resign until after the cancellation. Each of these seven employees cited the RIF notices as the reason for seeking and accepting other employment. Two of the affected employees, Mr. Ivan Orton and Mr. Donald S. Copper, submitted letters to us setting forth their reasons for leaving the Government after receipt of the RIF notice. Also submitted was a memorandum from James C. Miller III, Chairman of the FTC, to the Commission concerning the suspension of the plan to close the affected regional offices. Based on this memorandum, the two employees argue that the cancellation of the RIF was procedurally improper.

Payment of severance pay is authorized by 5 U.S.C. § 5595 (1976), which provides that an employee who has been employed currently for a continuous period of at least 12 months, and is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, is entitled to be paid severence pay. The issue then is whether the resignations of the seven employees from the FTC are to be considered involuntary separated.

The severance pay regulations, specifically 5 C.F.R. § 550.706 (1982), set forth situations in which an employee's separation by resignation is deemed to be an involuntary separation. A resignation after receiving a RIF notice would be an involuntary separation under this regulation. However, 5 C.F.R. § 550.701(b)(2), provides that:

> This subpart [severance pay] does not apply to an employee who at the time of separation from the service, is offered and declines to accept an equivalent position in his agency in the same commuting area, including an agency to which the employee with his function is transferred in a transfer of functions between agencies. For purposes of this paragraph, an equivalent position is a position of like seniority tenure, and pay other than a retained rate.

It should be noted that the regulations do not specifically address the situation here in which a RIF was canceled, and employees were allowed to remain in the same positions they were holding when the RIF was first proposed. It also should be noted that the regulation specifically refers to "the time of separation" as the key time for the offer of an equivalent position.

In this case, Mr. Orton and the other individuals involved could have retained their positions, instead of separating from the agency, after the RIF was canceled. It is clear under the regulations that if the FTC had offered them equivalent positions in the same commuting area, and the RIF had taken place, they would not have been entitled to severance pay.

It is equally clear that since the employees, following the cancellation of the RIF, were allowed to remain in the same positions, in the same offices, at the same grades and pay, they were also ineligible to receive severance pay under the statute. That is, the option to remain in the same position rendered their subsequent separation a voluntary one and precludes payment of severance pay.

The argument that the entitlement to severance pay vests on the date a written resignation is submitted, instead of the date of separation, is not persuasive. Under the provisions of the Federal Personnel Manual, Chapter 715, Subchapter 2, a resignation is a voluntary action by an employee, and an agency may permit an employee to withdraw the resignation at any time before it has become effective, except when the agency has a valid reason to deny the withdrawal. FPM Chapter 715, S2-3. In this case each of the seven employees could have withdrawn his resignation following the cancellation of the RIF, but each chose not to do so.

The two employees who wrote letters to us raise several arguments in support of their claims for severance pay. First, they argue that they resigned from their positions in reliance on the proposed actions of the agency, that is, abolition of their jobs. Also, they allege that the FTC promised to pay them severance pay even if the RIF was canceled. Since they relied on these actions to their detriment, they argue that the Government should be estopped from denying them severance pay.

We must disagree with the two employees. The doctrine of estoppel is not applicable here because the relationship between the Government and its employees is not contractual, but appointive, and is governed strictly in accordance with statutes and regulations. *William J. Elder and Stephen M. Owen,* 56 Comp. Gen. 85 (1976).

Next, one of the employees argues that he had already given his personal commitment to start new employment before the RIF was canceled. He alleges that his professional reputation would be tarnished if he withdrew that commitment. He also states that he could have left the FTC immediately while the RIF was still in effect, but that he chose not to do so since he was in the midst of handling important cases for the FTC. He states that if he had resigned immediately, his files and cases could not have been transferred to other employees in an orderly manner. We believe that the employee's actions were in accord with the highest professional standards of Federal attorneys. However, we have no choice but to decide the severance pay issue in strict accordance with the applicable statute and regulations.

Finally, both employees allege that there may have been procedural irregularities in the cancellation of the RIF. Mr. Cooper has submitted the memorandum from Chairman Miller as evidence of the alleged procedural irregularities. However, our Office does not decide such questions and that issue is more properly addressed to the Merit Systems Protection Board. We do not rule in any way on the procedural propriety of the FTC's proposed RIF or its cancellation thereof, but hold only that the statute and regulations preclude payments of severance pay when employees are separated from the service by resignation after a proposed RIF has been canceled.

Accordingly, our decision is that the seven employees in question are not entitled to severance pay.

[B-209302]

Discharges and Dismissals—Military Personnel—Involuntary Separation—Pub. L. 96-513 Effect—Travel and Transportation Allowances—To Home of Selection

The Joint Travel Regulations, Vol. 1, may be amended to include travel and transportation allowances to a home of selection for a member discharged or released from active duty with separation pay under 10 U.S.C. 1174 (Supp. IV, 1980). A statute must be read in the context of other laws pertaining to the same subject and should be interpreted in light of the aims and designs of the total body of law of which it is a part.

Matter of: Home-of-Selection Travel and Transportation Allowances, February 1, 1983:

We have been asked whether Volume 1 of the Joint Travel Regulations may be amended to include travel and transportation allowances to a home of selection for a uniformed services member discharged or released from active duty with "separation pay." Release from active duty with separation pay was added by the Defense Officer Personnel Management Act. Public Law No. 96-513, section 109, 94 Stat. 2835, 2870, enacting 10 U.S.C. § 1174 (Supp. IV, 1980). Travel and transportation allowances provided under 37

U.S.C. §§ 406 (d) and (g) for a member's dependents and household effects were amended to reflect release from active duty with separation pay. Pub. L. No. 96-513, section 506. However, 37 U.S.C. § 404(c) which authorizes a qualified member to select his home for the purpose of travel and transportation allowances was not amended to refer to a member released with entitlement to separation pay. We find that, in accordance with the purpose and intent of Congress in providing for release of members with entitlement to separation pay, they are also entitled to travel and transportation allowances to their home of selection when they otherwise qualify.

The question was presented by the Assistant Secretary of the Army (Manpower and Reserve Affairs), and was assigned Control No. 82-22 by the Per Diem, Travel and Transportation Allowance Committee.

Background

The Defense Officer Personnel Management Act, cited above, amended titles 10 and 37 of the United States Code. A primary purpose of the Act was to revise and standardize the law relating to appointment, promotion, separation, and mandatory retirement of Regular commissioned officers of the Army, Navy, Air Force, and Marine Corps. See S. Rep. No. 96-375, 96th Cong., 1st Sess. (1979). Significantly revised were procedures providing for a lump-sum payment upon involuntary separation ("separation pay").

Separation pay is a contingency payment for members of the armed services involuntarily separated from active duty after completing 5 years of service but prior to becoming entitled to retirement pay. The purpose of the separation payment is to ease the member's re-entry into civilian life. S. Rep. No. 96-375 at p. 28. Prior to the Defense Officer Personnel Management Act there were various types of separation payments. Regular officers who were discharged received "severance pay" while Reserve members who were involuntarily released received "readjustment pay."

The readjustment and severance pay provisions were repealed and superseded by a new section. Pub. L. No. 96-513, section 109. The new provision, 10 U.S.C. § 1174 (Supp. IV, 1980), provided a standard name ("separation pay") and formula for computing the amount of pay due to members involuntarily separated from the service. Because a member with less than 10 years of service would receive more under the older provisions, a savings provision was included to permit a member on active duty when the new law was enacted to elect under either the old or new provisions. Pub. L. No. 96-513, section 607.

The standardization of the separation pay procedures required conforming amendments to the travel and transportation allowances provisions. Travel and transportation allowances to a home

of selection upon separation or retirement are provided under 37 U.S.C. §§ 404 and 406. Section 406 allows travel and transportation allowances for dependents, baggage and household effects. Specifically, section 406(d) authorizes nontemporary storage of baggage and household effects; section 406(g) provides for transportation of dependents and household goods. These travel and transportation allowances are available only to members entitled to make a home of selection under 37 U.S. § 404(c) (1976). Section 404(c) permits a qualified member to elect a home of selection within 1 year of separation. To qualify for these allowances a member involuntarily separated must have "at least eight years of continuous active duty with no single break therein of more than 90 days." 37 U.S.C. §§ 404(c)(1)(B); 406(d)(2); 406(g)(2) (1976).

In enacting Pub. L. No. 96-513, Congress technically amended 37 U.S.C. §§ 406(d)(2) and 406(g)(2) to specifically refer to release from active duty with separation pay. However, a similar amendment was not made to 37 U.S.C. § 404(c). Therefore, the qualifying language in section 404(c) providing for selecting a home upon release for members involuntarily separated remains:

> • • • immediately following at least eight years of continous active duty with no single break therein of more than 90 days, is discharged with severance pay or is involuntarily released from active duty with readjustment pay • • •. 37 U.S.C. § 404(c)(1).

As is indicated above, sections 406 (d) and (g) were specifically amended to reflect the change to separation pay for an involuntarily separated member who:

> • • • immediately following at least eight years of continous active duty with no single break therein of more than 90 days, is discharged *with separation pay* or severance pay or is involuntarily released from duty *with separation pay* or readjustment pay. • • • [Italic supplied.]

Since section 404(c) was not changed by the Defense Officer Personnel Management Act, the Assistant Secretary questions whether the Joint Travel Regulations can be amended to include home-of-selection travel and transportation allowances for members released from active duty with separation pay.

Discussion

The Joint Travel Regulations implement the basic laws relating to travel for uniformed services personnel. Thus, to determine if the Joint Travel Regulations can be amended to include transportation allowances to a home of selection for a member discharged or released from active duty with separation pay, we must find that there is appropriate statutory authority.

This requires that we interpret 37 U.S.C. § 404(c) in light of the later enacted 10 U.S.C. § 1174. Not only must a statute be given a rational and sensible interpretation, it must also be read in the context of other laws pertaining to the same subject and should be interpreted in light of the aims and designs of the total body of law

of which it is a part. *Cohen* v. *United States,* 384 F.2d 1001 (Ct. Cl. 1967).

Section 404(c) does not include the phrase "discharged or involuntarily released with separation pay." Thus, a literal interpretation of section 404(c) would deny travel allowances for travel to a home of selection to members released with separation pay. However, such a restricted reading of section 404(c) would lead to an absurd result. Only those members with 8 continuous years of service who elected severance pay or readjusment pay under the saving clause would be entitled to the travel allowances to a home of selection. Those members who elected the new category of separation pay (which replaces severance and readjustment pay) would not technically come under the section 404(c) entitlement provision. Clearly, this is not what Congress intended. The technical amendment of section 406 to include references to separation pay shows that Congress meant the travel benefit provisions to be read in conjunction with the new pay category.

The legislative history is silent as to why section 404(c) was not amended, which lends support to the conclusion that it was an oversight. There is no indication that the unifying of separation pay was intended to prevent the granting of travel benefits upon home of selection. Congress made no substantial changes in the eligibility for the additional pay nor did Congress substantively affect the travel and transportation entitlements. Therefore, all the rights and benefits applicable to Reserve members and Regular officers under the prior separation provision would still pertain under the new law. Thus, we are led to the conclusion that a member involuntarily separated with separation pay would be entitled to the same benefits as a member released with readjustment pay or discharged with severance pay. *Cf.* 55 Comp. Gen. 166 (1975). When we read 37 U.S.C. § 404(c) in light of 10 U.S.C. § 1174, and the amendments to 37 U.S.C. § 406 discussed above, we find that members who have served continuously for 8 years and subsequently are discharged or involuntarily released with separation pay are entitled to travel and transportation allowances to a home of selection.

Accordingly, amendment of the Joint Travel Regulations to that effect is authorized.

[B-207318]

Appropriations—Availability—Seizure of Private Property—Marshals Service—Storage Costs

After the Marshals Service takes custody of property seized by the United States pursuant to the execution of a warrant *in rem,* it becomes the obligation of the Marshals Service rather than the agency under whose substantive statutory authority the goods were seized to pay unpaid storage costs that are the responsibility of the United States Government. Since the Marshals Service has the statutory responsibility to seize and hold property attached pursuant to *in rem* action, the appropri-

ations for the Marshals Service should be used to pay such expenses. There is no authority in the legislation governing the Marshals Service or the other agencies involved, such as the Dept. of Agriculture or the Food and Drug Administration, that would allow those agencies to pay such expenses either initially as "substitute custodian" or by reimbursing the Marshals Service.

Appropriations—Permanent Indefinite—Unavailability—Storage Charges—U.S. Marshals Service Seizures—Meat Products

Permanent judgment appropriation, 31 U.S.C. 1304 is not available to pay storage charges assessed against the United States, where the Marshals Service has the legal responsibility to pay such charges once it seizes the property pursuant to the execution of a warrant *in rem*.

Matter of: Payment of Storage Fees—United States Marshals Service, February 2, 1983:

This decision is in response to a request from the United States Department of Agriculture (USDA) for our Office to render a legal opinion concerning the payment of fees for the storage of goods seized by the United States. The specific question we were asked to address is whether the responsibility for paying storage costs when goods are seized and held by the United States rests with the Marshals Service which executes the seizure warrant, or the Federal agency—such as USDA or the Food and Drug Administration (FDA)—under whose substantive statutory authority the goods are seized initially. Our decision specifically addresses FDA's legal authority in this respect, because FDA advised us that the same issues of statutory and fiscal responsibility have arisen between it and the Marshals Service.

For the reasons set forth hereafter, it is our opinion that after the Marshals Service takes custody of property seized by the United States pursuant to the execution of a warrant *in rem*, it becomes the obligation of the Marshals Service, rather than the other agency involved, to pay any storage costs that are the responsibility of the United States Government.

USDA's request for our legal opinion to resolve this matter was triggered by the dispute that arose between the USDA and the Marshals Service in the case of the *United States of America* v. *2,116 Boxes of Boned Beef*, 516 F. Supp. 321 (D. KAN 1981). Accordingly, a discussion of what happened in that case is a useful starting point for the purpose of understanding and exploring the broader issues involved.

That case began in April 1980, when a meat inspector for the Food Safety and Inspection Service (FSIS) of USDA discovered what he suspected were illegal implants of diethylsilbesterol (DES) in 237 animals which were being slaughtered at a federally inspected slaughtering establishment. Under the authority set forth in section 402 of the Federal Meat Inspection Act, 21 U.S.C. § 672, the carcasses were initially detained administratively by the FSIS at the slaughter facility pending further inquiry. Subsequently, after

concluding that the DES had been implanted, FSIS referred the matter to the United States Attorney for the District of Kansas with a recommendation that further action be taken to seize, condemn, and dispose of the boned beef and offal under sections 403 and 404 of the Act, 21 U.S.C. §§ 673 and 674.

On May 14, 1980, the United States Attorney filed a complaint *in rem* alleging that the beef and offal were adulterated with DES within the meaning of subsections 1(m)(1), (2), and (3) of the Act, 21 U.S.C. § 601(m)(1), (2) and (3). Pursuant to a motion made by the United States, the court issued a warrant of arrest for the allegedly contaminated meat products. Subsequently, acting under the warrant *in rem,* the United States Marshal for that jurisdiction seized the beef and offal which remained in the custody of the Marshals Service, at the United Refrigerator Services cold storage warehouse in Kansas from August 1980 until the seized products were released by court order in August 1982.

After the seizure, the owner intervened as claimant on behalf of the seized meat products. In a trial before the United States District Court for the District of Kansas, the court determined that the boned beef and offal were not adulterated within the meaning of the Federal Meat Inspection Act. By order dated May 7, 1981 (which was modified on July 17, 1981), the court dismissed the complaint *in rem* and ordered that the beef be returned to the claimant and that costs of the action "including cost of storage of beef" be assessed against the United States. The court then granted a stay of its order that the beef be released, pending appeal by the Government. At that time, the court orally ordered the United States to begin to pay the storage costs that previously had been paid by the claimant. However, as a result of the dispute between the Marshals Service and the USDA as to which agency had the legal responsibility and obligation to pay the storage costs, United Refrigerator Services was not paid by anyone.

By letter dated August 18, 1982, the Department of Justice advised us that the Government's appeal has been dismissed and that the Department did not plan to seek further review of the judgment. The Department furnished us with a copy of the final order of the trial court, dated August 9, 1982, which after acknowledging the action of the Tenth Circuit Court of Appeals in dismissing the Government's appeal, with prejudice, lifted its earlier stay and directed the United States Marshal to release the beef. In that order, the court directed the United States to pay storage costs up to the effective date of that order.

When USDA submitted this question to us, it expressed the view that the permanent judgment appropriation, 31 U.S.C. § 1304 (formerly 31 U.S.C. § 724a) could be used to pay the storage costs incurred in that specific case. Nevertheless, the matter was submitted to us because of USDA's concern that the same problem could occur in other instances where allegedly adulterated or misbranded

articles were seized by the Federal Government under any one of a variety of statutes. Examples of such statutes include the Federal Meat Inspection Act, the Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.*, or the Egg Products Inspection Act, 21 U.S.C. § 1031 *et seq.*, all of which are administered by USDA, or the Federal Food, Drug and Cosmetics Act, 21 U.S.C. § 301 *et seq.*, administered by the FDA. Therefore, after resolving the general question of which agency is responsible for paying the unpaid storage costs when the Marshals Services executes a warrant *in rem*, our decision further addresses the specific issue of whether the judgment appropriation can be used to pay the storage costs in this particular case or any other case of this type.

Under the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.*, USDA has authority to take various actions to insure that meat and meat products are wholesome, not adulterated, and are properly marked, labeled, and packaged. Pursuant to section 402 of the Act, 21 U.S.C. § 672, USDA has the administrative authority to detain carcasses and meat products that it reasonably believes to have been adulterated or misbranded for a period not to exceed 20 days pending further action under section 403 of the Act, 21 U.S.C. § 673. Under that section, a seizure and condemnation action against the allegedly adulterated meat may be brought in a United States District Court in the name of the United States by the Department of Justice. Although USDA may refer a case to the Department of Justice, the responsibility for deciding whether or not to pursue the case in the courts and how to conduct the litigation rests solely with the Department of Justice. *See* 28 U.S.C. § 516.

If the Justice Department pursues the case, it files a complaint *in rem*. The court may then issue a warrant of arrest for the meat, which a United States Marshal executes by seizing and holding the meat pending the outcome of the case. As stated in Rule E(4)(b) of the Supplemental Rules of the Federal Rules of Civil Procedure, if the type of property involved is such that the taking of actual possession is impracticable, the Marshal may seize the goods in place by affixing a copy of the process to the goods. Then the goods will remain in the constructive possession of the court until final disposition of the case.

If the Government prevails in the court proceeding and the meat is condemned, section 403 of the Act, 21 U.S.C § 673, provides that "* * * court costs and fees, and storage and other proper expenses shall be awarded against the person, if any, intervening as claimant of the article or animal." However, the statute does not cover situations in which the United States does not prevail or in which no claimant intervenes.

All of the parties involved in this dispute, including the Marshals Service, agree that the primary responsibility for executing an arrest warrant *in rem* that is issued by a Federal court when prop-

erty is attached and held by the United States rest with the Marshals Service. In that respect, 28 U.S.C. § 569(b) reads as follows:

> United States marshals shall execute all lawful writs, process and orders issued under authority of the United States * * * and command all necessary assistance to execute their duties.

More specifically, Rule E(4)(b) of the Supplemental Rules of The Federal Rules of Civil Procedure, governing actions *in rem,* provides that when "tangible property is to be attached or arrested, the Marshal shall take it into his possession for safe custody." Also, see Rule C(3) of the Supplemental Rules which provides that after a complaint is filed in an *in rem* action "* * * the clerk shall forthwith issue a warrant for the arrest of the property that is the subject of the action and deliver it to the marshal for service."

It is clearly a statutory responsibility of the Marshals Service to seize and hold property that is attached pursuant to an arrest warrant *in rem,* especially so when the seizure is on behalf of the United States. Accordingly, it logically follows that the monies appropriated for the functions and activities of the Marshals Service should be used to pay the expenses incurred in connection with the seizure and storage of the attached property. This has been recognized both in decisions of the Comptroller of the Treasury as well as the Comptroller General. For example, in 26 Comp. Dec. 702 (1920), the Comptroller of the Treasury explicitly recognized this when he said the following:

> This section [section 26 of the National Prohibition Act] imposes upon United States marshals and their deputies as officers of the law the duty of making seizures and arrests in accordance with its requirements. * * * The making of these seizures and arrests is a duty added by the law to the other duties of the marshal's office. Any expense incident to the discharge of this added duty is payable from the proper judiciary appropriation [which at that time contained the appropriation for the Marshals Service] and not from the special appropriation for its enforcement carried by the National Prohibition Act.

Also, see 22 Comp. Dec. 280 (1915) and the following decisions of the Comptroller General in which the propriety of using the Marshals Service appropriation to pay expenses of this type was recognized and upheld—27 Comp. Gen. 111 (1947), 14 *id.* 880 (1935), and B-62620, April 16, 1947.

Additional support for the conclusion that the moneys appropriated for the Marshals Service are available to pay expenses of this type is set forth in the United States Marshals Financial Management Manual (pages 330.03 and 330.04) which includes "Storage expenses" in a list of the different types of expenses that should be paid out of the Marshals Service appropriation. *Also, see* pages 320.14 to 320.20 of the Financial Management Manual and page I-N8 of the Appendix to the Budget for Fiscal Year 1982.

The Marshals Service does not dispute its role in executing *in rem* actions or the availability of its appropriations to pay, at least initially, the expenses incurred, including storage costs, in connection with such seizures. However, in its letter to us the Marshals

Service maintains that "it is only fair that the initiating agency pay for expenses and costs attendent to the transportation, storage and disposal of goods seized by the Marshals Service in support of *in rem* actions initiated by the specific agency." Such a result could be effected in its view either through payment by the agency in the first instance under a "substitute custodian approach" or by the agency reimbursing the Marshals Service for its expenditures.

We believe that since the primary responsibility for executing *in rem* warrants clearly rests with the Marshals Service, as stated above, its appropriations, and not those of the initiating agencies, should be used for that purpose at least in the absence of specific statutory authority for those agencies to use their own funds. Having examined the relevant legislation, including the statutes governing USDA and FDA on the one hand, and the Marshals Service on the other, we do not believe that either FDA or USDA generally has such authority.

First, since USDA does not have the statutory responsibility or authority either to hold the meat beyond the initial 20-day period of administrative detention, or to initiate formal court proceedings, we do not believe that the Federal Meat Inspection Act would authorize USDA to reimburse the Marshals Service for storage costs that are incurred after the Marshals Service executes the warrant *in rem* and seizes the meat. In this respect, we agree with USDA that its appropriations are available and should be used to pay the storage costs that arise during the period of USDA's administrative detention of the property.

Our conclusion is the same with respect to seizures by the FDA, which operates under similar statutory authority—the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* Seizures under section 304 of that Act, 21 U.S.C. § 334, are also actions *in rem* brought by the Department of Justice with the Marshals Service having the responsibility to execute the arrest warrant.

Second, as for the so-called "substitute custodian approach," we do not believe that provides any basis for transferring the legal responsibility for paying the costs incurred in connection with the storage of property seized by the Marshals Service from the Service to another agency. In this respect, the Marshals Services cites Rule (E)(d) of the Supplemental Rules to support this argument. While Rule E(4)(d) does authorize the marshal to "apply to the court for directions with respect to property that has been attached or arrested" it says nothing about appointing a substitute custodian or transferring the legal obligation for paying expenses of seizing and keeping property away from the Marshals Service to another agency. In fact, Rule E(4)(e) specifically states that none of the preceding rules alters the provisions of 28 U.S.C. § 1921 concerning such expenses. As amplified below, 28 U.S.C. § 1921 does not allow the Marshals Service to recover its fees from another Federal agency.

Finally, having concluded that the Marshals Service appropriations are initially chargeable with the storage costs, and that there is no explicit requirement that the initiating agencies reimburse the Service, we must determine whether there is any implicit statutory authority for requiring or authorizing USDA or FDA to reimburse the Marshals Service for its expenditures. We are not aware of any such authority.

The primary argument of the Marshals Service is based on 28 U.S.C. § 1921. The Marshals Service does not argue that this provision authorizes it to recover its costs from the owner of the seized property who intervened since the purpose of the statute is "to reimburse the federal government for services rendered to private litigants by United States marshals." See *Hill* v. *Whitlock Oil Service Inc.,* 450 F.2d 170 (10th Cir. 1971). In fact, since the complaint in this type of case is brought by the Justice Department in the name of the United States, the seizure by the Marshals Service is really effected on behalf of the United States, rather than any particular agency. Nevertheless, the Marshals Service maintains that provision "gives it mandatory authority to charge initiating agencies any and all costs and expenses relative to the transportation, storage and disposal of goods seized in support of an *in rem* action." However, our review of 28 U.S.C. § 1921 as well as several other relevant statutory provisions and their legislative histories not only fails to provide any support for this position, but actually supports the contrary interpretation.

In this respect, 28 U.S.C. § 1921 provides as follows:

> Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:
>
> * * * * * * *
>
> For the keeping of property attached (including boats, vessels, or other property attached or libeled) actual expenses incurred, such as storage, * * *. The marshals shall collect, in advance, a deposit to cover the initial expenses for such services and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded * * *.

The Marshals Service states in its letter to us that the statute "makes no exception for the billing of Government agencies for the kind of expenses indicated by that statute." However, the legislative histories of this and related provisions clearly indicate that the statute was only intended to apply to situations in which the Marshals Service acts on behalf of private litigants. For example, when 28 U.S.C. § 1921 was most recently amended in 1962 to read as it now does (for the purpose of increasing the amount of the fees specified therein), the report of the Senate Committee on the Judiciary explained the purpose of the legislation as follows:

> Section 1921 of title 28, United States Code, specifies the fees to be charged by U.S. marshals for the service of various types of process on behalf of private litigants. Those fees have remained substantially the same since they were prescribed by the act of February 26, 1853 (10 Stat. 164), over 100 years ago.
>
> * * * * * * *

In the past, the fees charged under this system were adequate to pay for the services and travel expenses of marshals. The result was that service of process on behalf of private litigants cost the Government little or nothing.

In 1896, this system for the payment of marshals was changed. All fees were to be paid into the Treasury. Marshals and gradually all deputy marshals were put on a salary basis and were paid for their expenses in accordance with general regulations.

Since 1886 both salaries and expense allowances have increased substantially. However, the fees charged by the Government for the services of marshals have, with the exception of mileage, remained the same as they were in the middle of the 19th century.

Recently the Department of Justice and the General Accounting Office conducted a joint survey of the cost of serving process. The survey disclosed that the annual cost of serving process on behalf of *private litigants* exceeded the fees charged by approximately $411,000.

The committee believes that the bill which would make modest increases in fees charged to *private litigants* for the services of U.S. marshals is meritorious and recommends it favorably. [Italic supplied.] See S. Rep. No. 1785, 87th Cong. 2d Sess. (1962).

Also, see *Hill* v. *Whitlock Oil Services, Inc., supra.*

The 1896 legislation referred to in the Senate Report that converted the system by which the marshals were paid from a fee to a salary basis also contained the following provision concerning marshals' fees:

That * * * all fees and emoluments authorized by law to be paid to United States district attorneys and United States marshals shall be charged as heretofore and shall be collected, as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the Treasury of the United States; and said officers shall be paid for their official services * * *:

Provided, That this section shall not be construed to require or authorize fees to be charged against or collected from the United States * * *. [Italic supplied.] See Act of May 28, 1896, ch 252, 886, 295 Stat. 179.

The purpose of this provision was clear—to insure that fees collected by United States marshals were to be used to reimburse the Government for the services provided by the marshals to *private litigants.* The provision expressly provided that collection of marshals' fees from the United States was neither required nor authorized. Subsequently, this provision, with some modifications, was set forth in title 28 of the United States Code as follows:

* * * all fees and emoluments authorized by law to be paid to United States marshals shall be charged and collected, as far as possible, and deposited by said marshals in accordance with the provisions of section 495 of Title 31, *Provided,* That this section shall not be construed to require or authorize fees to be charged against or collected from the United States . * * *. See 28 U.S.C. § 578a (1940).

In 1948, when title 28, was recodified, the foregoing provision was revised and incorporated into 28 U.S.C. § 551 (1952) in the following form:

Each United States Marshal shall collect, as far as possible, his lawful fees and account for the same as public monies.

The identical provision is currently set forth at 28 U.S.C. § 572(a). When the current language was adopted in 1948 as part of the recodification of title 28, the revision was explained in the following manner:

Section 578a of title 28, U.S.C. 1940 ed., is rewritten in simplified terms *without change of substance.* The proviso of such section 578a, prohibiting the collection of

fees from the United States, was omitted as covered by section 2412 of this title, providing that the United States should be liable only for fees when such liability is expressly provided by Congress.

The provision of section 578a of title 28 U.S.C. 1940 ed., requiring that fees and emoluments collected by the marshals shall be deposited by him in accordance with the provisions of section 495 of title 31, U.S.C. 1940 ed, * * * was omitted as said section 495 governs such deposits without implementation in this section. [Italic supplied.] *See* 28 U.S.C. § 572 note (1976).

Thus, the clear intent of Congress in 1896 when the office of United States marshal was made a salaried position that marshals collect fees for services furnished to *private litigants* in order *to reimburse the Government* for the cost of providing such services was never changed, even though the statutory language was amended and the express statutory provision prohibiting the Marshals Service for collecting fees from other Federal agencies was deleted from the section. Although 28 U.S.C. § 2412 was amended in 1966 to allow judgments against the United States to award costs to the prevailing party, that should have no impact on the interpretation of 28 U.S.C. § 1921 which does not concern costs awarded to a prevailing party. Accordingly, we do not believe that 28 U.S.C. § 1921 in any way authorizes either the Marshals Service to charge or another Federal agency to pay such storage charges.

As stated above, numerous decisions of the Comptroller of the Treasury including 4 Comp. Dec. 637 (1898), 5 *id.* 871 (1899), 22 *id.* 280 (1915), 26 *id.* 702 (1920), and 26 *id.* 938 (1920), as well as several decisions of the Comptroller General support our position here. For example, in 14 Comp. Gen. 880 (1935), our Office held as follows:

* * * Under the circumstance stated, the expense of guarding the vessel from the date of its seizure until the present time, the vessel being under the jurisdiction of the court and in custody of the United States marshal, is authorized under the appropriation "Salaries, fees, and expenses of marshals, United States courts" as a proper expense of guarding seized property held by the marshal under order of the court.

Also, see 27 Comp. Gen. 111 (1947) and B-62620, April 16, 1947.

The Marshals Service contends that these three Comptroller General decisions are not applicable to the issue raised in this case because those decisions merely held that expenses incurred after the execution of an *in rem* warrant can be paid out of the appropriation for the Marshals Service but did not address the impact of 28 U.S.C. § 1921 or the right of the Marshals Service to be reimbursed for its expenditures by the other agencies involved. We disagree with their assessment of the meaning and applicability of those decisions.

In each of the Comptroller General decisions, and in several of the cited decisions of the Comptroller of the Treasury as well, the basic issue involved was the same one involved here—whether the expenses incurred in connection with the seizure and storage of property seized and held by a United States marshal should be paid out of the Marshals Service appropriation or the appropriation of the other agency involved. In each of those decisions, it

was determined that once the marshals executed the *in rem* warrant and seized the property, any related expenses should be paid out of the marshal's appropriation. Those decisions would not be consistent with the position now being urged by the Marshals Service of allowing the appropriated funds of the other agency involved to be used to reimburse the appropriation of the Marshals Service. While it is true that those decisions did not expressly consider 28 U.S.C. § 1921, it is our view, as explained above, that nothing contained in that provision authorizes such reimbursement or would otherwise have any effect on the result reached in those decisions.

Accordingly, it is our conclusion that it is the responsibility of the Marshals Service rather than the other agency involved to pay the costs incurred in connection with court-ordered seizures of goods by the Marshals Service.

The final issue that must be resolved is whether the permanent judgment appropriation, 31 U.S.C. § 1304, may ever be used to pay court costs including storage charges, assessed against the United States in a case of this type. We do not believe the judgment appropriation is available to pay such storage charges for several reasons.

First, under 28 U.S.C. § 2412 costs can only be assessed against the United States for the purpose of "reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation." Ordinarily, however, payment of storage charges after property is seized and held by the Marshals Service is the responsibility of the Marshals Service, at least until the case is adjudicated and resolved. Thus, there would normally be no occasion for a court to award these charges against the United States.

In this respect, we note that what happened in the case of the *United States of America* v. *2,116 Boxes of Boned Beef, supra,* appears to be somewhat atypical. In that case, after the beef was seized by the Marshals Service and held in its custody at the United Refrigerator Services cold storage warehouse, the owner of the beef continued to pay the storage charges until the trial court dismissed the complaint and assessed costs against the United States. Nevertheless, even in this case we do not believe the judgment appropriation is available to pay the storage costs.

The judgment appropriation is only available to pay judgments and costs when "payment is not otherwise provided for * * *." However, as explained at length above, payment of these storage charges is otherwise provided for. It is the legal responsibility of the Marshals Service to use its appropriations to pay storage charges after it seizes and holds property unless costs are assessed against the owner under 21 U.S.C. § 673 or a similar statute. We do not believe the Marshals Service may refuse to pay the charges and thereby shift the burden of payment either to the owner of the property or to the judgment appropriation. Accordingly, it is our conclusion that the judgment appropriation is not available to pay

storage costs either in this particular case or in any other case of this type.

[B-208203]

Compensation—Overtime—Fair Labor Standards Act—Recordkeeping Requirement—Noncompliance Effect—Employee's Evidence

Where agency has failed to record overtime hours as required by Fair Labor Standards Act (FLSA), and where supervisor acknowledges overtime work was performed, employee may prevail in claim for overtime compensation for hours in excess of 40-hour workweek on the basis of evidence other than official agency records. In the absence of official records, employee must show amount and extent of work by reasonable inference. List of hours worked submitted by employee, based on employee's personal records, may be sufficient to establish the amount of hours worked in absence of contradictory evidence presented by agency to rebut employee's evidence.

Compensation—Overtime—Fair Labor Standards Act—"Suffered or Permitted" Overtime—Agency Directive Against Overtime—Enforcement Requirement

Where employee has presented evidence demonstrating that she performed work outside her regular tour of duty with the knowledge of her supervisor, the fact that agency sent her a letter directing that she not perform overtime work does not preclude her from receiving compensation under the FLSA for such work actually performed. Despite its admonishment, agency must be said to have "suffered or permitted" employee's overtime work since supervisor allowed employee to continue working additional hours after employee had received, but had failed to comply with, agency's directive.

Compensation—Overtime—Fair Labor Standards Act—Hours of Work Requirement—Paid Absences—Not Hours of Work

Under FLSA, overtime is computed on basis of hours in excess of 40-hour workweek, as opposed to 8-hour workday. Additionally, paid absences are not considered "hours worked" in determining whether employee has worked more than 40 hours in a workweek.

Compensation—Overtime—Fair Labor Standards Act—Statute of Limitations

Employee who was previously awarded backpay for overtime work performed from June 23, 1974, through Jan. 4, 1976, seeks additional compensation for overtime work from Jan. 4, 1976, through June 17, 1978. Since prior claim was filed in General Accounting Office (GAO) on July 15, 1980, portion of claim arising before July 15, 1974, should not have been considered by agency since Act of Oct. 9, 1940, as amended, 31 U.S.C. 3702(b)(1), bars claim presented to GAO more than 6 years after date claim accrued. Therefore, agency should offset amount of prior erroneous payment against amount now due to employee.

Matter of: Frances W. Arnold—Overtime Claim Under the Fair Labor Standards Act, February 3, 1983:

This decision is in response to a request from Ms. Anita R. Smith, an authorized certifying officer with the Department of Agriculture (USDA) in New Orleans, Louisiana, concerning the claim of Ms. Frances W. Arnold for overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1976). For the rea-

sons stated below, we hold that payment of Ms. Arnold's claim for overtime compensation may be authorized.

At the time of her retirement in March 1980, after 42 years of Federal service, Ms. Arnold was employed by the Farmers Home Administration (FmHA), USDA, in Marysville, Kansas, as a GS-5 County Office Assistant, a nonexempt position under the FLSA. In May 1980, shortly after her retirement, Ms. Arnold filed a claim with the FmHA for $12,445.48 in overtime compensation for hours she claims to have worked between January 1976 and November 1978.

The hours for which Ms. Arnold requests compensation cannot be verified by the agency now because the daily work measurement cards have been destroyed in the intervening years. Yet, Ms. Arnold's supervisor does recall seeing her work hours in excess of her normal tour of duty and has stated in a letter to FmHA's State Director, dated May 28, 1980: "I can verify [that] overtime was worked." He states, however, that he cannot verify the exact number of hours worked by the claimant. In support of her entitlement to overtime pay, Ms. Arnold submitted to the agency both a handwritten report and a typed report listing all overtime hours she claims to have worked. The agency then apparently used the reports submitted by Ms. Arnold to prepare its own reconstructed Time and Attendance reports covering the dates in question. The employee evidently reconstructed her claim from personal records that she kept from 1976 to 1978.

The certifying officer has questioned Ms. Arnold's entitlement to overtime pay in light of the information contained in two internal agency memoranda advising Ms. Arnold and her supervisor that she was not to be permitted to work hours outside of her regular tour of duty. The first of these memoranda, dated March 5, 1975, was from the FmHA District Director to Ms. Arnold. He stated as follows:

> It has come to my attention that you may be working hours beyond the regular duty hours of 8:00 a.m. to 5:00 p.m.
>
> Under the Fair Labor Standards Act of 1974 we cannot permit you to work any overtime that is not authorized and FmHA cannot authorize employees in the nonexempt status to work any hours except from 8:00 a.m. to 5:00 p.m. You must schedule, organize and give priority to work most essential. It is realized [that] some work cannot always be accomplished in the hours of 8:00 a.m. to 5:00 p.m. so it must be delayed until another time.
>
> This is to confirm the previous discussions we have had on working overtime. Please refer to Kansas Bulletin 1722(200) dated June 13, 1974 and if you have any questions, please contact me.

Despite this admonishment, the employee continued to work hours in excess of her regular tour of duty. Although Ms. Arnold's supervisor (who was the only other person working in the Marysville office) knew that she was continuing to work overtime, he apparently took no action to prevent her from doing so. Furthermore, the agency itself has submitted no evidence to show that anyone

else intervened to ensure Ms. Arnold's compliance with the March 5 directive.

Some time later, the FmHA State Director was informed that Ms. Arnold was not complying with the terms of the memorandum and was contining to work overtime. In an effort to remedy the situation, he sent her a second letter on June 8, 1978, over 3 years after the initial memorandum had been sent. In that letter, the Director stated:

> Reports indicate that * * * you are working more than eight hours per day in order to perform your job. * * *
> *This letter is notifying you that you cannot continue working more than eight hours per day for the FmHA.* This eight hours must be performed between 8:00 a.m. and 5:00 p.m. [Italic in original.]

A copy of this letter also was sent to Ms. Arnold's supervisor in Marysville, since a footnote at the bottom of the letter was specifically addressed to him. That footnote stated: "CS, Marysville—Note: If employee continues to come to work before 8:00 a.m. and leaves after 5:00 p.m., you are to pick up her office keys."

Shortly after she received the State Director's letter, Ms. Arnold went on extended sick leave pending her retirement. Her retirement became effective on March 22, 1980, and she submitted her claim for overtime compensation to the agency 2 months later.

The certifying officer's submission notes that Ms. Arnold has previously submitted a claim to the agency for overtime compensation for excess hours worked during 1974 and 1975. Although that claim was processed and paid in December 1981, the certifying officer further states, "[w]e now question the validity of [the prior] claim in view of the District Director's memorandum of March 5, 1975."

The certifying officer also has asked us whether the holding in our recent decision *Christine D. Taliaferro,* B–199783, March 9, 1981, is relevant to the pending claim. In that decision, we ruled that the FLSA requires employers to "make, keep and preserve all records of the wages, hours and other conditions and practices of employment." The certifying officer has raised the issue of the FLSA's recordkeeping obligation in this case because the FmHA did not maintain all of the records pertinent to Ms. Arnold's claim. Specifically, the certifying officer asks the following questions:

> 1. Would the fact that Ms. Arnold was formally advised in March 1975 that she could not work any overtime, unless it was authorized, nullify her claim since the time worked was in contravention of a direct order?
> 2. If the claim is allowed, would the documentation submitted by the employee be adequate to process the claim?
> 3. If the claim is disallowed, should we try to recover the amounts already paid subsequent to [the District Director's] memorandum to Ms. Arnold?

The FLSA provides that a nonexempt employee shall not be employed for a workweek in excess of 40 hours unless the employee receives compensation for the excess hours at a rate not less then 1½ times the regular rate. 29 U.S.C. § 207(a)(1). The Act defines "hours worked" as all hours which the employer "suffers or permits" the employee to work. 29 U.S.C. § 203(g). Work is "suffered or

permitted" if it is performed for the benefit of an agency, whether requested or not, provided that the employee's supervisor knows or has reason to believe that the work is being performed. Under FLSA, employers have a continuing responsibility to ensure that work is not performed when they do not want it to be performed. Furthermore, "[m]anagement *must assure* that supervisors *enforce that rule.*" Federal Personnel Manual (FPM) Letter 551-1, May 15, 1974. (Italic in original.) In addition, the courts have cited approvingly the Department of Labor's regulation on this matter which states as follows:

> • • • it is the duty of the management to exercise its control and see that [overtime] work is not performed if it does not want it to be performed. • • • The mere promulgation of the rule against such work is not enough. *Management has the power to enforce the rule and must make every effort to do so.* [Italic supplied.] 29 C.F.R. § 785.13. See *Mumbower v. Callicott,* 526 F. 2d 1183, 1188 (8th Cir. 1975).

As noted above, Ms. Arnold's supervisor was aware that she was working hours in excess of her normal tour of duty. Yet, neither he nor anyone else from the agency took the action necessary to terminate this activity. Since Ms. Arnold was performing actual overtime work both with the knowledge of her supervisor and for the benefit of the agency, and this work was accepted by the agency, we believe that the agency must be said to have "suffered or permitted" her to work overtime. The fact that the District Director sent a memorandum to Ms. Arnold directing her not to work overtime hours is in itself not sufficient to show that the agency did not "suffer or permit" the overtime work. While the proscriptive language in that memorandum would have been sufficient to prevent the claimant from collecting overtime pay under the "officially ordered or approved" language of 5 U.S.C. § 5542, it is not sufficient under the "suffered or permitted" language of the FLSA. In the absence of evidence showing that the agency or the employee's supervisor took further action and was successful in preventing her from working overtime, we conclude that the overtime work performed by Ms. Arnold was "suffered and permitted" by the agency and is therefore compensable under the FLSA. The certifying officer's first question is answered accordingly.

With regard to the standard of proof necessary to substantiate a claim under the FLSA, our decisions impose a special burden on the agencies. Initially, the employee must prove that she has in fact performed overtime work for which she was not compensated. She must then produce sufficient evidence to show the amount and extent of the that work as a matter of just and reasonable inference. *Christine D. Taliaferro,* B-199783, March 9, 1981. At that point, the burder of proof shifts to the employing agency either to show the precise amount of work performed or to rebut the employee's evidence. *Jon Clifford, et al.*, B-208268, November 16, 1982.

An agency cannot deny an employee's overtime claim on the basis of incomplete or unavailable records. The FLSA requires em-

ployers to "make, keep and preserve all records of the wages, hours and other conditions and practices of employment." 29 U.S.C. § 211(c) (1976). Where the agency has failed to keep adequate records, it must either rebut the employee's evidence by other means or pay the claim.

In *Christine D. Taliafereo,* above, the agency failed to record the employee's overtime hours as required by the FLSA. The claimant, however, was able to provide the agency with a list of overtime hours worked, which was compiled from her personal calendar. Additionally, the employee's supervisor stated that he had observed the claimant working overtime and had no reason to doubt the veracity of her records; furthermore, he actually recommended that the claim be paid. In light of the above, we held that the claimant both "prove that she in fact performed overtime work" and "produce sufficient evidence to show the amount and extent of her work as a matter of just and reasonable inference." This shifted the burden of proof to the agency, either to show "the precise amount of overtime work performed" or "to negate the reasonableness of the inference to be drawn from the employee's evidence." Since the agency could not produce any evidence on the matter, we held that it was required to pay Ms. Taliaferro's overtime claim.

The record in this case supports Ms. Arnold's claim that she performed work for which she was not properly compensated under the FLSA. Ms. Arnold's supervisor verifies that she worked overtime. Furthermore, like Ms. Taliaferro, Ms. Arnold has submitted a list, which she transcribed from her own personal records, of the dates, times and amounts of overtime hours she claims to have worked. We believe that Ms. Arnold's list, like Ms. Taliaferro's list, constitutes sufficient evidence to show the amount and extent of her work as a matter of just and reasonable inference. Since FmHA has not come forward with evidence of the precise amount of overtime work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence, Ms. Arnold is entitled to overtime pay under the FLSA.

Under the FLSA, only those hours in excess of a 40-hour workweek, as opposed to an 8-hour workday, are compensable as overtime. 5 C.F.R. § 551.501(a). In addition, "[p]aid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work" for purposes of computing overtime under the FLSA. 5 C.F.R. § 551.401(b). In examining the reconstructed Time and Attendance reports submitted by the agency in this case, we found a number of instances in which the agency had improperly characterized the employee's annual, holiday and sick leave as "hours of work" in determining her entitlement to overtime pay. Therefore, before FmHA pays Ms. Arnold's claim, it should conduct a thorough review of its Time and Attendance reports to assure that the employee does not receive overtime pay for hours which are not in fact "hours of work" under the FLSA.

In light of the agency's apparent recent error in characterizing Ms. Arnold's annual, holiday and sick leave as "hours of work" under the FLSA, we now question the correctness of the amount paid to Ms. Arnold in 1981, in satisfaction of her prior overtime claim. Therefore, before FmHA pays the current claim, it should also review any available information concerning Ms. Arnold's prior claim, including its reconstructed Time and Attendance reports and Ms. Arnold's own notes detailing her work from 1974 to 1975. If FmHA determines that it overpaid Ms. Arnold in 1981 because it improperly classified her annual, holiday and sick leave as "hours of work" for purposes of computing FLSA overtime, the agency should offset the amount previously overpaid against the sum now due to Ms. Arnold for overtime work performed from 1976 to 1978.

Finally, the Act of October 9, 1940, as amended, 31 U.S.C. § 3702 (b)(1), provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in this Office within 6 years of the date it first accrued or be forever barred. Filing a claim with any other Government agency does not satisfy the requirements of the Act. *Frederick C. Welch,* 62 Comp. Gen. 80 (1982); *Nancy E. Howell,* B-203344, August 3, 1981. Nor does this Office have any authority to waive any of the provisions of the Act or make any exceptions to the time limitations it imposes. *Frederick C. Welch* and *Nancy E. Howell,* above. We have previously held that the 6-year statute of limitations is applicable to claims for overtime pay under the FLSA. *Transportation System Center,* 57 Comp. Gen. 441 (1978). In such cases, the claim is said to accrue when the overtime work is actually performed. *Paul Spurr,* 60 Comp. Gen. 354 (1981).

Ms. Arnold's current claim for overtime pay from January 4, 1976, through June 17, 1978, is not barred by 31 U.S.C. § 3702(b)(1), since it was filed with GAO on September 5, 1980, and was thus well within the applicable 6-year limitation period. However, a portion of Ms. Arnold's prior claim should not have been paid by the agency. Since the earlier claim was initially filed in GAO on July 15, 1980, the agency should not have considered any portion of that claim arising before July 15, 1974. Therefore, the agency should now offset the amount erroneously paid to Ms. Arnold in 1981 for overtime work from June 23, 1974, through July 14, 1974, against the amount to be paid in satisfaction of the current claim.

Accordingly, with the qualifications stated above, FmHA may pay the claim.

[B-207764]

Pay—Retired—Survivor Benefit Plan—Children—Physically Handicapped Adults—Dependency Status During Employment

The adult daughter of a deceased Navy officer received a Survivor Benefit Plan annuity under 10 U.S.C. 1447(5)(B)(iii) based on a determination that she was incapable of self-support because of physical incapacity. She was quadraplegic as the result of childhood polio. Despite this disability, she later secured full-time Government employment in a grade GS-5 position. This does not warrant suspension of the annuity on the basis that she is no longer incapable of self-support, even though a grade GS-5 salary would normally be sufficient to cover the living expenses of a physically fit person, since that salary is not sufficient for her own personal needs.

Pay—Retired—Survivor Benefit Plan—Beneficiary Payments—Handicapped Beneficiaries—Implementing National Employment Policy

In view of the current national policy concerning employment of the handicapped, as reflected in law and executive proclamation, military survivor annuity plans should not be applied in a manner that would discourage handicapped beneficiaries from seeking employment, or would result in the permanent termination without notice of the annuity of one who is attempting to become self-sufficient through gainful employment. Procedures should be established to implement that policy. Further, if an annuity is suspended because the beneficiary is determined to be capable of self-support, but the original disabling condition causes a reoccurring loss of self-sufficiency, we will consider whether the annuity may be reinstated in an appropriate case.

Matter of: Sydna Jean Elrod, February 8, 1983:

This action is in response to a request for a decision from the Disbursing Officer, Navy Finance Center, on the question of whether the Survivor Benefit Plan annuity that Sydna Jean Elrod has been receiving as the result of her physical disability should be suspended because she has secured full-time gainful employment. The request was approved by the Department of Defense Military Pay and Allowance Committee and was assigned submission number DO-N-1399.

We conclude that Ms. Elrod's Survivor Benefit Plan annuity may not be suspended in the circumstances presented.

Ms. Elrod was born in 1946. When she was 4 years old she contracted polio and was permanently disabled. Although she has partial use of her right hand, she cannot stand or walk, nor can she operate hand rims on a wheelchair. Hence, military physicians have diagnosed her as quadraplegic. Despite this handicap, she was able to attend college when she was a young adult. Later, in December 1980 when she was 34 years old, she successfully completed a 10-month course in computer programming sponsored for the severely disabled by an agency of the State of Maryland. Then in May 1981 she secured full-time employment on a probationary basis with the Social Security Administration in Baltimore as a computer programmer, grade GS-5.

Ms. Elrod's father was an officer of the United States Navy. When he retired from active service in 1973, he elected to partici-

pate in the Survivor Benefit Plan, thus chosing to receive retired pay at a reduced rate in order to provide an annuity for his dependent daughter if she survived him. The Navy commenced payment of an annuity to her following his death in October 1979. The annuity was suspended on December 30, 1981, after she advised Navy officials of her full-time employment with the Social Security Administration, and it then no longer appeared to those officials that she was incapable of self-support.

Ms. Elrod subsequently questioned the propriety of the Navy's suspension of her annuity. Essentially, she acknowledged that most persons holding full-time grade GS-5 positions with the Government can be regarded as capable of self-support, since the gross yearly salary of more than $13,000 that is attached to a grade GS-5 position would be sufficient to cover ordinary and necessary living expenses. However, she pointed out that her own ordinary living expenses, because of her physical disability, included additional necessary expenditures for the purchase and maintenance of motorized wheelchairs and other essential equipment, for extra medical care and part-time medical attendants, for suitable living quarters exceeding the minimum standard requirements of physically fit persons, for transportation by taxicab or customized van, etc. She suggested that the net pay of a grade GS-5 Government employee was insufficient to cover her own ordinary living expenses, if these additional costs of living were taken into account, and she provided some cost figures to demonstrate this. She suggested that in the circumstances she was not actually capable of self-support, and that her Survivor Benefit Plan annuity therefore should not have been suspended. She also asked why the first notice she received of the suspension had been in the form of a letter from her bank advising her that her account was overdrawn.

In requesting a decision in the matter, the Disbursing Officer indicates that Ms. Elrod's continued eligibility for the annuity under 10 U.S.C. 1447(5)(B)(iii) appears doubtful, notwithstanding the facts she presents, because of the principles set forth in our decisions 44 Comp. Gen. 551 (1965), and 53 *id.* 918 (1974).

The Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, is an income maintenance program for the dependents of deceased service members. Eligible dependents include a member's child who is more than eighteen years old but "incapable of supporting himself because of a mental or physical incapacity existing before his eighteenth birthday * * *." See 10 U.S.C. 1447(5)(B)(iii).

Congress established the Survivor Benefit Plan in 1972, through enactment of Public Law 92-425, to provide a new and more comprehensive system of survivor protection for the dependents of service members and to eventually replace the then current survivor annuity program contained in the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431 *et seq.* See, generally, 53 Comp. Gen. 847, 852 (1974). That annuity program contains a similar pro-

vision extending beneficiary eligibility to dependent children over eighteen years of age who are "incapable of supporting themselves because of a mental defect or physical incapacity existing before their eighteenth birthday * * *." See 10 U.S.C. 1435(2)(B).

The decisions referred to by the Disbursing Officer, 44 Comp. Gen. 551 (1965) and 53 *id.* 918 (1974), concerned the application of 10 U.S.C. 1435(2)(B) under the Retired Serviceman's Family Protection Plan. In 44 Comp. Gen. 551, at page 558, we held, "Once it has been determined that a child over 18 years of age is incapable of self-support, evidence warranting a conclusion that the child actually is capable of sustaining an earning capacity for his own personal needs would be sufficient to remove the child from the category of one incapable of self-support." We also stated that once the annuity was terminated it could not later be reinstated because we were able to find "no provision in the Retired Serviceman's Family Protection Plan for reinstatement as an eligible beneficiary." In 53 Comp. Gen. 918, at pages 920 and 921, we observed further that whether a person was capable of self-support depended upon the individual facts of the particular case and that we were therefore unable to issue guidelines on how determinations should be made for any class or type of disability.

We find that the rationale of certain of the principles expressed in those two decisions may properly be applied to the Survivor Benefit Plan. Specifically, we conclude that an annuity payable on the basis of 10 U.S.C. 1447(5)(B)(iii) may properly be suspended if evidence exists demonstrating that the beneficiary has become independently capable of earning amounts sufficient for his own personal needs through substantial and sustainable gainful employment. Also, the determination in any given case of whether a handicapped beneficiary has become capable of self-support depends upon the individual facts of that particular case.

In the case of Sydna Jean Elrod we find no basis for the suspension of her Survivor Benefit Plan annuity in December 1981 or at the present time, since the evidence of record does not demonstrate that the salary of her grade GS-5 Government position is sufficient for her own particular personal needs. If she is able to maintain her employment and establish a career in her chosen field at a significantly higher rate of pay, then the matter of her continued eligibility for the annuity may be reconsidered.

Ms. Elrod's Survivor Benefit Plan annuity should be reinstated effective December 30, 1981, and payment issued accordingly.

More generally we recognize the established national policy that handicapped persons are to be encouraged to seek gainful employment, and that administrative obstacles hindering their employment are to be eliminated. See 36 U.S.C. 155, and Presidential Proclamation 4965, September 13, 1982. See also 5 CFR 203.1301(d)(4) (1982). Under that policy military survivor annuity plans should not be administered in a manner that would discour-

age a handicapped beneficiary from seeking employment, or would result in the permanent termination without notice of the annuity of a handicapped beneficiary who is attempting to become self-sufficient through gainful employment.

Accordingly, we find that procedures should be implemented to insure full consideration of the facts involved in case it becomes necessary to determine whether a beneficiary under the Survivor Benefit Plan or the Retired Servicemen's Family Protection Plan should be removed from the category of being incapable of self-support because of mental or physical incapacity. At a minimum the beneficiary should be advised of information the Service has indicating that he is no longer incapable of self-support, and be given a reasonable opportunity to submit rebutting evidence. Also, if it is determined that the beneficiary is, in fact, capable of self-support, advance written notice should be given prior to the suspension of the annuity, unless there is clear evidence of fraud or misrepresentation by the beneficiary.

In addition, we have reviewed the Survivor Benefit Plan and the Retired Serviceman's Family Protection Plan, and while we have found no provision in those plans specifically authorizing the reinstatement of a suspended annuity, neither have we found any provision which expressly precludes a disabled beneficiary from seeking reinstatement of his annuity following a period of suspension. In light of the beneficial purposes for which the plans were established and the current national policy concerning the employment of the handicapped, it may be that reinstatement should be allowed in an appropriate case. If eligibility for an annuity is suspended under 10 U.S.C. 1435(2)(B) or 10 U.S.C. 1447(5)(B)(iii) because the beneficiary is determined to be capable of self-support, but it later appears that the beneficiary is no longer self-sufficient because of the original disabling condition, and it appears that reinstatement is warranted, we would consider the circumstances and determine whether the rule in 44 Comp. Gen. 551 should be modified.

[B-209271]

Bids—Timely Receipt—Return to Bidder—Agency Error—Resubmission After Bid Opening Time—Hand-Carried Bid

Bid that was timely submitted at the place designated for receipt of bids, but was improperly returned to the bidder's possession where it remained until several minutes after the time set for opening of bids, may be considered for award where the bid was in a sealed envelope, the bidder possessed the bid for only 10 minutes, there was no suggestion that the bid was altered, and the bid was returned to the Government's possession prior to the opening of any bid; consideration of the bid would not compromise the integrity of the competitive bidding system.

Bids—Responsiveness—"Estimated Quantities" Provision—Interpretation

The contracting officer reasonably interpreted a clause, which provided that bids offering less than 75 percent of the estimated requirements would not be considered,

as referring to the estimated number of hours listed for each item and not to the number of items listed on the invitation for bids.

Matter of: Veterans Administration—Request for Advance Decision, February 8, 1983:

The Center Director of the Veterans Administration Medical Center, Northport, New York, requests an advance decision on a protest filed with the Center by Alert Coach Lines, Inc. regarding a bid submitted by Bimco Industries, Inc. in response to invitation for bids (IFB) No. 632-45-82. Alert contends that Bimco's bid should not be considered for award because it was submitted late. In its comments to this Office, Alert contends also that Bimco's bid was nonresponsive. We believe that the bid was not late and that the contracting officer reasonably determined that the bid was responsive. Accordingly, Bimco's bid may be considered for award.

The IFB was issued to obtain charter bus service for the Medical Center. The solicitation stated that hand-carried bids must be received in the depository located in Supply Service Building No. 10, room 201, by 2 p.m. on August 27, 1982. We are informed that the normal procedure at the Medical Center regarding a hand-carried bid is that a bidder who comes to room 201, the Purchase and Contracts Office, is instructed to take his bid to room 218, two doors down the hall. There, a secretary receives and time-stamps the bid. The bid is then taken by the secretary into the Chief of the Purchase and Contracts Section's office where the Chief or his Assistant deposits it in the safe, where it remains until the time set for bid opening. A bidder who wishes to attend the bid opening is informed where the bid opening will occur and requested to wait down in the lobby where the conference rooms are located.

Normal procedures were not followed in this case. The person who received and stamped both of the bids submitted in response to the IFB was a clerk-typist who had been temporarily assigned to act as secretary for the Chief of Supply; she had not been advised of the normal procedures for handling bids. Sometime prior to 2 p.m. on August 27, a representative of Alert submitted a hand-carried bid to the secretary in room 218. After time-stamping the bid, the secretary handed it back to Alert's representative and instructed him to go downstairs to room 114 to await the opening of bids. As the representative was leaving room 218, the bid opening officer walked past. Alert's representative, who had submitted bids on previous solicitations at the Medical Center, and who was familiar both with normal procedures and with the bid opening officer, handed the bid to her. She deposited it in the safe.

At approximately 1:52 p.m., a representative of Bimco submitted a bid to the secretary in room 218. The bid envelope was time-stamped and handed back to the representative who was told to go downstairs to room 114 to await bid opening. The Bimco representative was reportedly unaware of the normal procedure for han-

dling bids, having submitted no other bids at the Medical Center in recent years.

At 2 p.m., the bid opening officer left her office with the bid submitted by Alert. As she entered room 114, accompanied by the recorder of bids, she noticed that there were two men present. Knowing that she had but one bid envelope in her possession, the bid opening officer asked if the two men were together. She was advised that they were not. She asked the man who she did not know if he had tendered a bid. He replied, "Yes, to the girl upstairs." The bid opening officer immediately turned and left the room. She ran upstairs and asked the secretary whether she had received another bid. She was told that another bid had been received, timestamped and returned to the bidder, who was told to wait downstairs. The bid opening officer then ran back downstairs and asked the representative from Bimco if he had his bid. He said that he did, and handed the sealed bid envelope to the bid opening officer. By this time it was several minutes after 2 p.m. The bid opening officer looked at the bid envelope and noted that it was timestamped 1:52 p.m. Both bids were opened and the results announced. The recorder of bids, who had remained in room 114, reports that the bid opening officer was gone for approximately 1 to 3 minutes. During this time, there was no conversation and no one left the room.

The regulations provide that bids received at the office designated in the invitation for bids after the exact time set for the opening of bids are late bids, Federal Procurement Regulations (FPR) § 1-2.303-1 and that a late hand-carried bid may not be considered for award. FPR § 1-2.303-5. In this case, it is clear that Bimco's bid was received at the designated office prior to the exact time set for the opening of bids. The Bimco bid does not, therefore, come within the regulatory definition of a late bid. In this instance, however, the bid was returned to the bidder and remained in the bidder's possession until shortly after the time set for bid opening.

We are aware of no case that has considered the exact factual situation presented here. A number of our prior decisions, however, address the question of whether a bid that was timely submitted, but improperly returned to the bidder by the Government, may be considered for award when it has been resubmitted after bid opening time. *See, e.g.,* 50 Comp. Gen. 325 (1970); *Delbert Bullock,* B-208496, September 7, 1982, 82-2 CPD 201. In these cases, our primary concern always has been with preserving the integrity of the competitive bidding system. Although generally a bid that has been returned to the bidder after the opening of bids may not be considered for award, *Dima Contracting Corp.,* B-186487, August 31, 1976, 76-2 CPD 208, there have been instances where we have held that a bid resubmitted after bid opening may be considered for award where it is clear that the integrity of the competitive bidding

system would not be compromised. *E.g.,* 50 Comp. Gen. 325, *supra;* 41 *id.* 807 (1962).

In this case, Bimco's bid was timely submitted, as evidenced by the time-stamp on the bid envelope. This sealed bid envelope was then returned to Bimco's representative by the Government official authorized to receive bids with instructions to go downstairs to await the bid opening. There is no evidence that the Bimco representative was aware that this was not normal Medical Center procedure. The time that elapsed from when the bid was time-stamped to when the bid was finally surrendered to the bid opening officer was just over 10 minutes. During most of this time, Bimco's representative was in the company of the recorder of bids, the bid opening officer, or the representative from Alert. At no time during this period was the Bimco representative aware of the contents of Alert's bid. There is not the slightest suggestion by any one that Bimco's bid was altered in any way. Also, there is no indication that the Bimco representative intentionally delayed surrendering the bid to the bid opening officer. By her own admission, the bid opening officer left room 114 so quickly after discovering that a second bid had been tendered that the Bimco representative had little opportunity to disclose the whereabouts of his bid.

Given the totality of the rather unique circumstances presented by this case, we believe that the integrity of the competitive bidding system would not be compromised were the Bimco bid considered for award. Failure to consider Bimco's bid would penalize it unfairly for a situation that was created almost exclusively by Government personnel. *See* 41 Comp. Gen. 807, *supra.*

The second issue raised by Alert involves the responsiveness of Bimco's bid. The IFB consists of seven items, each requiring a different type of charter bus service and each listing the estimated number of hours of that type of service that will be required. Paragraph 8 of the Special Conditions included in the IFB, entitled "Estimated Quantities," advises bidders that while it is impossible to determine the exact quantities that will be required during the contract term, each successful bidder will be required to provide all of the services that may be ordered during the contract term, except as otherwise limited in its bid. Bidders are further advised that bids stating that the total quantities delivered shall not exceed a certain specified quantity will be considered, but that bids offering less than 75 percent of the estimated requirements will not. Alert contends that because Bimco bid on only three of the seven items of the IFB, its bid fails to comply with the 75 percent requirement and should therefore be considered nonresponsive. Alert apparently interprets the "Estimated Quantities" provision as requiring each bidder to bid on at least 75 percent of the total number of items listed in the IFB.

The contracting officer determined that Bimco submitted a responsive bid. The contracting officer reports that the 75 percent

figure used in the "Estimated Quantities" clause refers only to the estimated number of hours listed for each item and not to the total number of items listed on the IFB. Since there is no indication on the Bimco bid that it is limiting its bid to a number of hours less than 75 percent of the estimated requirements bid on, the contracting officer determined that the bid complies with the solicitation.

We believe the contracting officer's interpretation of Special Condition 8 to be reasonable. The solicitation schedule is set up substantially as follows:

Item	Supplies services	Quantity Estimated	Unit	Amount
	Bus service charter: Medical administration School bus: Not less than 40 passenger. Two (2) each day, Monday thru Friday, except Saturday, & holidays, as follows:.			
1.	ONE: 5.26 Hrs., per schedule, Pages 6 & 7.	1,323	HR	
2.	ONE: 6.5 Hrs., per schedule, Pages 8 & 9.	1,638	HR	

It is difficult to read the "Estimated Quantities" clause as referring to anything other than the number of hours listed in the IFB in the column labeled "Quantity" and followed by the typed word "Estimated." The protester fails to suggest a single reason why or how this clause could be read otherwise. Consequently, there is no basis for us to question the contracting officer's determination that the Bimco bid was responsive.

Since paragraph 10(c) of Standard Form 33, incorporated by reference into the IFB, provides for multiple awards, and nothing in the IFB indicates that award is to be made in the aggregate, an award, if otherwise proper, may be made to Bimco for those items on which it bid.

[B-207094]

Travel Expenses—Overseas Employees—Return for Other Than Leave—Separation—Time Limitation on Travel—Private Employment at Termination Location Effect

In order for employee to be reimbursed expenses incident to return travel to former place of residence, travel must be clearly incidental to separation and should commence within reasonable time thereafter. Employee who resigned position effective Oct. 2, 1981, notified agency on Mar. 2, 1982, of intent to return to former place of

residence commencing on Sept. 23, 1983, and who accepted employment at location of resigned position does not meet requirements for reimbursement.

Matter of: Consuelo K. Wassink—Time Limitation on Return to Place of Residence, February 11, 1983:

This decision is in response to a letter from counsel of Ms. Consuelo K. Wassink, a former employee of the Bureau of Land Management (BLM), Department of the Interior. Ms. Wassink is appealing a BLM decision disallowing her request for prospective authorization for reimbursement of travel expenses and transportation of household goods for return travel to Boulder, Colorado, commencing September 23, 1983. The BLM denied her request for the reason that her return travel would not be clearly incidental to her separation as required by 28 Comp. Gen. 285 (1948).

For the reasons stated below, the disallowance by BLM is sustained.

Ms. Wassink was given an appointment by BLM effective June 21, 1975, as a Public Information Officer with the Alaska Outer Continental Shelf Office (OCS), Anchorage, Alaska. At the time of her appointment she was a resident of Boulder, Colorado. She was authorized travel and transportation expenses from Boulder, Colorado, with return rights, pursuant to 5 U.S.C. § 5722 (1976), and the implementing regulations currently contained in the Federal Travel Regulations FPMR 101-7 (September 1981) (FTR).

In her appeal, Ms. Wassink states, through counsel, that she believes that her notice of intent to exercise relocation rights, which was given on March 2, 1982, exactly 5 months after her resignation became effective, was both incident to her resignation and in accordance with 28 Comp. Gen. 285 (1948). Ms. Wassink's counsel states that "[b]ased on her understanding of regulations and information provided by Alaska OCS's Management Services Division, Petitioner properly requested a departure date well within the two-year time limit—September 23, 1983." Additionally, counsel points to several circumstances which he asserts prevented Ms. Wassink from disclosing her intention to exercise relocation rights earlier, or in fact to relocate before September 1983. First, he notes that Ms. Wassink was asserting a claim before the State Employment Security Division for unemployment compensation benefits which was not resolved until January 26, 1982. Further, counsel notes that although Ms. Wassink did successfully seek further employment in Alaska after her claim with the State Employment Security Division was resolved, this was done only after being informed by the Chief of Management Services, Alaska OCS, BLM, that interim employment was " 'nothing to worry about' and would not affect her return rights." Additionally, counsel points out that Ms. Wassink owns real property in Alaska which she needs time to market before moving, and time to act responsibly toward her lease tenants.

Ms. Wassink's return travel is governed by Chapter 2 of the FTR which states in paragraph 2-1.5a(2), that:

> All travel, including that for the immediate family, and transportation, including that for household goods allowed under these regulations, shall be accomplished as soon as possible. The maximum time for beginning allowable travel and transportation shall not exceed 2 years from the effective date of the employee's transfer or appointment * * *.

With regard to an employee's entitlement to travel and transportation benefits back to the continental United States following separation, this Office has long adhered to the position that the travel of such employee be *clearly incidental* to the termination of his assignment, and that the travel should commence within a reasonable time after the assignment has been terminated in order for return expenses to be reimbursable. 52 Comp. Gen. 407 (1973); 28 *id.* 285 (1948). Therefore, any advice Ms. Wassink may have been given at the time of her separation to the effect that she had an unqualified 2-year period in which to exercise her return rights would not have been in accord with either applicable regulations or decisions of this Office. Further, Ms. Wassink was reemployed in Alaska, and we have held that acceptance of private employment at the termination location generally requires the view that subsequent return travel is not incident to the separation. 37 Comp. Gen. 502 (1958).

On the basis of the information presented, it appears that Ms. Wassink did not intend to return to the continental United States at the time she was separated or at any time prior to September 23, 1983, a date which cannot be considered clearly incidental to her termination. Her exact intentions at the time of her resignation are not clear from the record except to the extent that she did not evidence any intent to make use of her return rights to the continental United States until 5 months after her resignation became effective, and then only to propose a return date of approximately 2 years after her resignation. We also fail to note the significance of the claim filed by Ms. Wassink with the State Employment Security Division, as referred to by counsel, since its sole purpose was to obtain additional unemployment insurance benefits. Accordingly, in the circumstances her decision to move to the continental United States commencing September 23, 1983, could not revive her rights to reimbursement of the expenses involved.

Ms. Wassink failed to comply with the requirements of law as interpreted in the decisions of this Office for travel to her home in the continental United States at Government expense upon separation. Therefore, we must affirm the decision of the Bureau of Land Management.

[B-207472]

Contracts—Contract Disputes Act of 1978—Inapplicability—Matters Covered by Other Statutes—Transportation Act—Claims' Settlement

Claims for transportation services furnished under the Transportation Act of 1940 are not subject to the disputes resolution procedure of the Contract Disputes Act of 1978 (CDA) since legislative history of CDA indicates no Congressional intent to extend coverage to matters covered by other statutes.

Matter of: Department of Agriculture—Request for Advance Decision, February 14, 1983:

The Acting Director, Office of Finance and Management, Department of Agriculture, has requested an advance decision concerning the applicability of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601-613 (Supp. IV 1980), to disputes arising from transportation services furnished under a Government bill of lading (GBL). Specifically, the question presented is whether the authority granted a contracting officer under the CDA supersedes the procedures for settling claims and disputes under existing transportation law. For the reasons discussed below, we believe that the CDA does not apply to disputes arising from transportation services covered by a GBL.

By way of background, a GBL is the basic procurement document used by the Government for acquiring freight transportation services from common carriers under Section 321 of the Transportation Act of 1940, as amended, 49 U.S.C. § 10721 (Supp. IV 1980). The Act authorizes the procurement of transportation services, at published rates, from any common carrier lawfully operating in the territory where such services are to be performed.

Under the Transportation Act of 1940, as amended, 31 U.S.C. § 3726 as adopted by Pub. L. 97-258 (formerly 31 U.S.C. § 244 (1976)), Executive agencies must make payment upon presentation of bills by a carrier prior to audit, whether or not the charges are disputed. The General Services Administration (GSA) is by law the agency with authority to audit the charges, to deduct any amount deemed to be an overcharge, and otherwise to effect settlement. *Id.* Claims arising from the furnishing of transportation services, including services furnished by a carrier under a GBL, therefore must be presented in writing to GSA or its designee agency. Further, a claimant desiring a review of the transportation settlement action taken by GSA or by a designee agency may request review by the General Accounting Office (GAO).

Under the CDA, however, the disputes procedures are invoked by the filing of a claim with the contracting officer. CDA § 6(a). The CDA requires that all claims by a contractor or by the Government against a contractor be the subject of a decision by the contracting officer which is final and conclusive unless an appeal is timely

commenced. CDA § 6 (a), (b). An appeal may be filed with an agency board of contract appeals or a contractor may instead bring an action directly on the claim in the United States Claims Court (formerly the Court of Claims). CDA §§ 7, 8, 10. Thus, individual Executive agencies under the CDA are authorized to administratively resolve, at least initially, disputes concerning claims relating to contracts awarded by each agency.

Obviously, the statutory provisions concerning agency resolution of claims under the CDA and the Transportation Act of 1940 are dissimilar. As stated above, under the CDA, individual Executive agencies, through their contracting officers, are authorized to resolve disputes concerning claims relating to contracts awarded by each agency. Under the Transportation Act of 1940, the Executive agencies have no such adjudicatory authority over claims for transportation services rendered for the account of the United States. Rather, such authority is vested exclusively in the GSA, subject to an appeal to GAO.

The language of the CDA is broad enough to literally encompass all contract claims, since the CDA applies to "any express or implied contract" entered into by an Executive agency for the procurement of property or services. CDA § 3(a). In this regard, we have recognized that a GBL serves as a contract of carriage between a carrier and the Government for freight transportation acquired under the Transportation Act of 1940. 55 Comp. Gen. 174 (1975). However, the CDA itself, even though it contains a repealer section, does not repeal any provision of existing statutes relating to the disputes resolution provisions of the Transportation Act of 1940, *see* CDA § 14 ("Amendments and Repeals"), and repeal by implication is not favored by the law. 1A Sutherland, *Statutes and Statutory Construction* 23.10 (4th Ed. C. Sands 1973). Moreover, the legislative history, which we look to because the CDA, if applied to transportation services, and the Transportation Act of 1940 contain conflicting provisions with respect to disputes arising from transportation services rendered, *Kenai Peninsula Borough* v. *State of Alaska,* 612 F.2d 1210 (9th Cir. 1980), does not mention transportation services as being subject to the Act.

The legislative history does indicate that the CDA implements the recommendations of the Commission on Government Procurement. *See* S. Rep. No. 95-1118, 95th Cong., 2nd Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 5235. The Commission's studies and recommendations had nothing to do with transportation claims. The Commission was concerned, among other things, with the distinction which had arisen regarding resolution of contract disputes arising "under" the contract and those arising outside the contract (*e.g.,* breach of contract claims). See *Report of the Commission on Government Procurement,* Volume 4, Chapter 2. All Congress did, in enacting the CDA, was to adopt a uniform system for

resolution of procurement contract disputes. *See* S. Rep. No. 95-1118, *supra.*

In other words, Congress merely intended to improve the disputes resolution procedures for contracts awarded under the procurement statutes. We find nothing in the CDA or its legislative history which indicates any intent on the part of Congress to extend CDA coverage to matters covered by other statutes, such as transportation claims under the Transportation Act of 1940.

Therefore, we conclude that the CDA is not applicable to the procurement of such transportation services.

[B-208270, B-208315.2]

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—After Withdrawal of Small Business Set-Aside—Prior to Bid Opening

Contracting officer reasonably determined that the public interest would best be served by canceling small business set-aside before bid opening in order to set aside the procurement for award to the Small Business Administration (SBA) under its 8(a) program for small, disadvantaged businesses (15 U.S.C. 637(a) (Supp. III, 1979)) where determination was: (1) an attempt to effectuate Government's socioeconomic interests; (2) necessary since contracting agency was unaware at time it issued small business set-aside that a viable 8(a) firm was capable of performing the work; and (3) concurred in by SBA.

Contracts—Small Business Concerns—Awards—Review by GAO—Procurement Under 8(a) Program—Contractor Eligibility

The determination whether to set aside a procurement under section 8(a) of the Small Business Act (15 U.S.C. 637(a)) and issues concerning contractor eligibility for subcontract award are matters for the contracting agency and Small Business Administration and are not subject to review by General Accounting Office absent a showing of fraud or bad faith on the part of Government officials.

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—Fraud or Bad Faith Alleged—Evidence Sufficiency

In protest involving 8(a) procurement, fraud or bad faith is not shown by: (1) fact that contracting agency originally considered sole-source award to large business; (2) fact that contracting agency initially issued total small business set-aside, then canceled it before bid opening in order to make 8(a) award to Small Business Administration (SBA); (3) allegation that SBA violated its own Standard Operating Procedures, since they may be waived.

Matter of: Marine Industries Northwest, Inc.; Marine Power and Equipment Company, February 16, 1983:

Marine Industries Northwest, Inc. (Marine Industries), and Marine Power and Equipment Company (Marine Power) protest against award of a contract for construction of a 140-foot icebreaking harbor tug to Bay City Marine, Inc. (Bay City), by the United

States Coast Guard. The award was made under the auspices of the Small Business Administration's (SBA) 8(a) program pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III, 1979).

The requirement had originally been the subject of a 100-percent small business set-aside, but the Coast Guard canceled the solicitation in order to make award under the 8(a) program. The protesters charge that: (1) cancellation of the small business set-aside was improper; (2) the Coast Guard is illegally attempting to award the major portion of the work to a large business subcontractor under the guise of an 8(a) award to a small, disadvantaged business; and (3) the SBA violated its own Standard Operating Procedures by proceeding with an 8(a) procurement for this requirement.

We find no merit to the protests.

The present procurement is for the seventh icebreaking harbor tug purchased by the Coast Guard. The first six tugs were all procured from Tacoma Boatbuilding Company (Tacoma). The Coast Guard considered the possibility of making a sole-source award to Tacoma before deciding to set aside the procurement for exclusive small business participation and on June 16, 1982, the Coast Guard issued invitation for bids No. DTCG23-82-B-30002 as a total small business set-aside. On July 6, the contracting officer notified potential bidders that the set-aside was canceled and that the requirement was going to be fulfilled by award to a socially and economically disadvantaged firm under the SBA's 8(a) program.

The protesters contend that the contracting officer improperly canceled the small business set-aside. More specifically, Marine Power argues that, under section 1-1.706-3(b) of the Federal Procurement Regulations (FPR) (1964 ed., amend. 192), a small business set-aside may not be canceled unless the continuation of the small business set-aside "would be detrimental to the public interest." In response, the Coast Guard argues that the cancellation was authorized under FPR § 1-2.208(a) (1964 ed., amend. 139), which allows a contracting officer to cancel any invitation before bid opening when doing so is "clearly in the public interest." The Coast Guard determined that cancellation was in the public interest "to effectuate the Government's legitimate socio-economic interests in awarding procurements to minority owned business firms under the 8(a) program."

We cannot find unreasonable the contracting officer's determination that the public interest would best be served by fulfilling the Government's socioeconomic interests by canceling the total set-aside in favor of procuring under the 8(a) program. The notice of cancellation stated that the Coast Guard would have procured on an 8(a) basis initially, but the Coast Guard was unaware at the time the small business set-aside was issued that there was a viable 8(a) firm capable of performing the work required, and the cancel-

lation and subsequent 8(a) award were undertaken with the concurrence of the SBA.

Where, through administrative error, a total small business set-aside was issued instead of an 8(a) set-side, we have held that it is not unreasonable for the contracting officer to rectify the error by canceling the total set-aside and awarding to a socially and economically disadvantaged firm under the 8(a) program. *A.R. & S. Enterprises, Inc.,* B-194622, June 18, 1979, 79-1 CPD 433; see also *A.R. & S. Enterprises, Inc.,* B-189832, September 12, 1977, 77-2 CPD 186. Indeed, we have even found proper a post-bid-opening cancellation, in a somewhat similar situation where a portion of an invitation for bids was canceled when it was discovered that through administrative error items were included in the solicitation which should have been set aside under the "Buy Indian Act." See *Hepper Oil Company,* B-189196, November 16, 1977, 77-2 CPD 378. In the present case, the total set-aside was canceled well before bid opening, August 17, 1982.

We are not convinced by Marine Power's argument that cancellation could only be authorized in accord with FPR § 1-1.706-3(b), which allows withdrawal of a small business set-aside if the contracting officer considers procurement from a small business to be "detrimental to the public interest." While that provision of the FPR is certainly applicable to small business set-asides, small business set-asides which are formally advertised are also within the purview of FPR § 1-2.208, which covers cancellation of an invitation for bids before bid opening and allows cancellation where it is "clearly in the public interest" to cancel. In other words, the two FPR provisions are not mutually exclusive, and we cannot find the contracting officer's reliance on FPR § 1-2.208 to be unreasonable in these circumstances.

The protesters contend that the Coast Guard is attempting to funnel the major portion of the work—75 to 85 percent—to Tacoma, a large business, under the guise of award to Bay City, an 8(a) firm. As evidence of wrongdoing on the part of the Coast Guard, the protesters point out that Tacoma received contracts to build the first six icebreaking tugs and that the Coast Guard gave serious consideration to awarding this contract to Tacoma on a sole-source basis. Marine Power also points out that the SBA, by letter of September 1, 1982, rejected the Coast Guard's offer to make an 8(a) award to Bay City through the SBA on the basis that it appeared that Tacoma, a large business, would benefit substantially more than Bay City. In its September 1 letter, the SBA stated that Bay City contemplated subcontracting 67 percent of the work and that the SBA's own standard operating procedure requires an 8(a) firm to perform a minimum of 50 percent of the work with its own labor force. The protesters point to the SBA's reversal of its decision to reject the proposed 8(a) award and acceptance of an 8(a) contract with subcontract awarded to Bay City (by

letter of September 28) as further evidence of improprieties in the conduct of this procurement.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with any Government agency with procuring authority and to arrange the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to let contracts to SBA upon such terms and conditions as may be agreed upon by the procuring agency and SBA. *Microtech Industries, Inc.,* B-205077, October 26, 1981, 81-2 CPD 346. The selection of an 8(a) contractor is basically within the broad discretion of the SBA and the contracting agency, and we will not question such decisions unless fraud or bad faith on the part of the Government officials can be shown or it is alleged that the SBA did not follow its own regulations. *J. R. Pope, Inc.,* B-204230, August 10, 1981, 81-2 CPD 114.

Here, the protesters have presented no evidence of fraud on the part of the Government officials. Moreover, the protesters bear a very heavy burden of proof when alleging bad faith on the part of the Government officials. *Anigroeg Services, Inc.,* B-206362.2, March 15, 1982, 82-1 CPD 241. To show that the contracting officer or SBA officials have acted in bad faith, the protesters would have to present irrefutable proof that these officials had a specific and malicious intent to injure the protesters. *Kalvar Corporation, Inc.* v. *United States,* 543 F. 2d 1298, 1301 (Ct. Cl. 1976).

In our view, the record is clear that there was no fraud or bad faith on the part of the Coast Guard or SBA personnel. We do not find any evidence of fraud or bad faith in the fact that the Coast Guard initially considered a sole-source award to Tacoma; such consideration was merely part of the many discretionary judgments a contracting officer must make before initiating a procurement action. As for the high percentage of work that Tacoma will allegedly perform as a subcontractor to Bay City, the record shows that Bay City's proposal was restructured after the initial SBA rejection so that Bay City would subcontract no more than 60 percent of the work. At the request of the Coast Guard, the SBA reconsidered its determination and decided to accept an 8(a) award on behalf of Bay City based on the increase in work to be performed by Bay City employees. We find no evidence of fraud or bad faith in this transaction. Certainly, the protesters have not carried their heavy burden of proof. In this regard, Marine Power requests our Office to independently investigate this matter to ascertain how Bay City suddenly acquired the capability to perform a larger portion of the work than it originally intended to perform. However, it is the protester that must bear the burden of proving its allegations; our Office does not investigate as part of our bid protest function to ascertain the validity of the protester's arguments. *Fire*

& Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415.

Marine Power alleges that the SBA failed to follow its own established procedures in proceeding with an 8(a) procurement in this case. More specifically, Marine Power argues that the SBA violated its own Standard Operating Procedure No. 80-05 (effective September 4, 1979), which states, among other things, that 8(a) procurements will not be considered where: (1) a public solicitation has already been issued as a small business set-aside; or (2) it is determined by SBA that a small business might suffer a major hardship if the procurement is removed from competition. We note that SBA Standard Operating Procedure No. 80-05 also specifies that an 8(a) subcontractor shall be required to perform 50 percent of the work required under a manufacturing contract.

Fraud or bad faith in the making of a set-aside is not shown by the allegation that the SBA violated its own standard Operating Procedure. *A.R. & S. Enterprises, Inc.,* B-189832, *supra.* Such procedures may be waived by the SBA. *A.R. & S. Enterprises, Inc.,* B-189832, *supra.* Here, both the paragraph in the Standard Operating Procedure concerning the situation in which a small business set-aside has already been issued and the paragraph requiring an 8(a) contractor to perform 50 percent of a manufacturing contract specifically include provision for waiver by the SBA. The manner in which the waivers are affected is a matter for SBA, not our Office, and does not affect the validity of award to Bay City. *A.R. & S. Enterprises, Inc.,* B-189832, *supra.* Moreover, regarding hardship to a small business caused by removal of a set-aside from competition in favor of an 8(a) award, the SBA specifically determined on September 28 that no small business firm would suffer a major hardship as a result of the 8(a) award to Bay City.

Finally, Marine Industries suggests that Bay City should be required under the terms of its contract to award the majority of its subcontracts to small business. However, we are unaware of any provision in statutes or regulations which requires inclusion of such restriction in an 8(a) contract for shipbuilding work, and the protesters have cited none. As previously discussed, the SBA—which is empowered by law to enter into contracts with other Government agencies and to negotiate the terms and conditions which are to be included in such contracts (15 U.S.C. § 637(a) (1976))—determined that an 8(a) contract should be awarded to Bay City even though it would perform only 40 percent of the work. The SBA recognized that Bay City "will benefit from the substantial management and technology transfer contemplated under this effort" and should be propelled to a "higher plane of development and competitive viability." Moreover, we have held that in the case of supply contracts which require a significant contribution to the manufacture of an end item by a small business contractor, a small business which will incur more than one-third of the contract costs has fulfilled

the significant contribution requirement. See *Chem-Teck Rubber, Inc.*, 60 Comp. Gen. 694 (1981), 81-2 CPD 232. Accordingly, our Office will not overrule the SBA's judgment in these circumstances.

The protest is denied.

[B-210599]

Bids—Guarantees—Bid Guarantees—Requirement—Construction Contracts Under $25,000—Administrative Authority

The Miller Act as amended, 40 U.S.C. 270a, does not preclude the General Services Administration from requiring bid guarantees in connection with bids for construction contracts under $25,000.

Matter of: Pine Street Corp., February 17, 1983:

Pine Street Corp. protests an amendment to General Services Administration solicitation number GS-11B-32019 (a solicitation for construction) that changed the requirement that bidders furnish a bid guarantee (bid bond) with bids exceeding $25,000 to the requirement that a bid guarantee be furnished with bids exceeding $10,000. Pine Street complains that the amendment is contrary to the Miller Act as amended, 40 U.S.C. 270a (Supp. IV 1980). The protest is summarily denied.

A bid bond is a creature of the procurement regulations; it is not a bond that is mandated by statute. The Miller Act amendment raised the dollar threshold for the requirement that performance and payment bonds be furnished from $2,000 to $25,000. The amendment did not alter the contracting officer's authority to require these bonds for bids below $25,000. See *Elevator Sales & Service, Inc.*, B-193519, February 13, 1979, 79-1 CPD 102. Similarly, the Federal Procurement Regulations (FPR), § 1-10.104 and § 1-10.105, require the use of performance and payment bonds in connection with any construction contract exceeding $25,000. The FPR does not prohibit their use in smaller construction contracts.

With respect to bid bonds, the FPR states only that the "use of a bid guarantee is required when a performance bond or a performance and payment bond is required." *Compare* Defense Acquisition Regulation § 10-102.2. The solicitation requires such bonds to be furnished. Thus, the amendment is not contrary to the Miller Act.

The protest is denied.

[B-207026]

Pay—Missing, Interned, etc. Persons—Retired Pay—Suspension—Pending Date of Death Establishment—Retiree in Private Employment

A retired service member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. In the absence of statutory authority similar to the Missing Persons Act, 37 U.S.C. 551–557, which permits continued payments until the member presumed dead by declaration of the Department of Defense, payment of retired pay may not be made for any period after the last date the member was known to be alive and his retired pay account is to be placed in a suspense status until the member returns or until information is received or judicial action is taken to establish his death and the date of death.

Debt Collections—Military Personnel—Retired—Missing, Interned, etc. Status—While In Private Employment—Erroneous Retired Pay Payments

A retired member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. Retired pay payments continued to be sent to the member's bank account (apparently a joint account with his wife) until 1981, when Finance Center first learned of missing status. Since it is not known whether the retired member is dead or alive, payments should be recouped for the period after the last date the retired member was known to be alive and credited to his account pending an acceptable determination of his existence or death.

Matter of: Major James H. Ackley, USAF, Retired, February 28, 1983:

This action is in response to a request for decision from an Air Force Accounting and Finance Officer, relating to the payment of retired pay in the case of Major James H. Ackley, USAF, Retired, who has been reported missing since March 8, 1973. We find that retired pay should not have been disbursed after the retiree became missing. This matter has been assigned submission number DO-AF-1389 by the Department of Defense Military Pay and Allowance Committee.

Major Ackley was retired from the Air Force effective July 1, 1963, under the provisions of 10 U.S.C. 8911. Subsequent to his retirement, he was employed as a civilian by Air America, Inc. His employment was neither as a member of a uniformed service, nor as a civilian officer or employee of the Federal Government.

It appears that while working for Air America, the plane in which Major Ackley was flying went down in Southeast Asia on or about March 8, 1973. He has been in a missing status ever since. The Air Force first became aware of this on October 5, 1981. Since he was receiving retired pay, action was immediately taken by the Air Force Accounting and Finance Center to suspend payment of retired pay effective October 1, 1981, and to advise Mrs. Ackley as to the reasons for payment suspension. The payments were made to the member's bank account which was apparently a joint ac-

count with his wife. Thus, Mrs. Ackley has apparently received the benefit of the continued retired pay payments. A total of $87,498.95 in retired pay had been paid by the Accounting and Finance Center between March 8, 1973, and October 1, 1981.

In response to the suspension of retired pay the Accounting and Finance Center received a letter from Mrs. Ackley's attorney, requesting reinstatement of the retired pay on the basis that Major Ackley had not been declared legally dead.

Based on the foregoing, the Air Force asks whether retired pay is payable for any period during which the member is in a missing status, and whether the Air Force is required to wait for a spouse to take action to have her husband declared dead before retired pay payments may be suspended.

The retired pay due a retired member of the armed services accures only during his lifetime. 48 Comp. Gen. 706 (1969). When the date of his death has been established, the only amounts payable are those which accrued until he died and they are to be paid in accordance with the provisions of 10 U.S.C. 2771. When a retired member is missing and there is no information concerning him, his retired pay must be suspended from the date that he was last known to be alive. 14 Comp. Gen. 411 (1934); 43 *id.* 503 (1964); B-201128, March 6, 1981.

Thus, in Major Ackley's case his retired pay was properly suspended pending a definite determination of his status. There is no provision of law similar to the Missing Persons Act, 37 U.S.C. 551-557, which would permit continued payment of retired pay as is the case with respect to active duty pay under those provisions. Further, we are not aware of any authority for the armed services to make a determination concerning whether a retired member who is missing is deceased. The Air Force must withhold payments of retired pay as soon as they are notified that the retired member is missing. Retired pay payments may not continue pending legal action by the retired member's spouse to have him declared dead.

We would like to point out that since Major Ackley was employed by a private contractor doing business with the United States, the Secretary of Labor is authorized to make presumption of death determinations under the authority of the War Hazard Compensation Act, 42 U.S.C. 1716. We suggest that the Air Force consult the Department of Labor in this case concerning any determinations which may have been made under that authority.

In any event, until such time as a definite determination concerning Major Ackley is made the Air Force should maintain his retired pay account in a suspended status and no disbursements from that account are authorized.

While not specifically stated in 48 Comp. Gen. 706 (1969) the conclusion that payments made after the date of a retiree's last known existence must be recouped, seems to be required. Accordingly, collection under the Federal Claims Collection Act, 31 U.S.C. 3711 *et*

seq. (formerly 31 U.S.C. 951-953 (1976) should be commenced, taking into consideration the factors referred to in that act and the regulations promulgated pursuant thereto. See 4 C.F.R. 101 *et seq.* The payments received pursuant to this action should be credited to the retired pay account. At such time as information is received or judicial action is taken resolving the doubt as to Major Ackley's status, a settlement will be issued by this Office based on the information. Additionally, at that time consideration will be given to any remedies available to Mrs. Ackley regarding any overpayments which may have been made.

Similar cases may be treated in accordance with this decision.

[B-207191]

Contractors—Responsibility—Determination—Review by GAO—Nonresponsibility Finding

Contracting officer's nonresponsibility determination based on data supplied by the contracting office, which showed protester delinquent on 70 percent of contract line items, and by the Defense Contract Administration Services Management Area (DCASMA), which showed protester delinquent on 26 percent of contracts due, was reasonable notwithstanding fact that some of the deliquencies may arguably have been agency's fault.

Contractors—Responsibility—Determination—Review by GAO—Nonresponsibility finding—Bad Faith Alleged

Fact that protester may have been found responsible by other contracting officers during same period in which protester was found nonresponsible under the protested procurement does not show that contracting officer acted in bad faith in making nonresponsibility determination because such determinations are judgmental and two contracting officers may reach opposite conclusions on the same facts.

Purchases—Small—Small Business Concerns—Certificate of Competency Procedures Under SBA—Applicability—Change in SBA Regulations

Where protester has not objected to contracting officer's failure to refer small business nonresponsibility determination to the Small Business Administration (SBA) for consideration under its Certificate of Competency procedures, GAO will not object to such failure to refer since the contracting officer's action was consistent with a Defense Acquisition Regulation which provides that such referral shall not be made when small purchase procedures are used, and since current SBA regulations provide that it is within the contracting officer's discretion to refer when contract value is less than $10,000.

Matter of: Amco Tool & Die Co., February 28, 1983:

Amco Tool & Die Co., a small business, protests the rejection of its quotation under request for quotations (RFQ) No. F41608-82-51332-02-23 issued on February 2, 1982, by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas, for five eye lift compressors. Amco disputes the propriety of the contracting officer's determination that it is nonresponsible. For the reasons that follow, we deny the protest.

The procurement was conducted as a total small business set-aside under the small purchase procedures set forth in Defense Acquisition Regulation (DAR) § 3-600 *et seq.* Amco's quote, with a unit price of $208.85 was low. The contracting officer determined, however, that Amco was nonresponsible [1] due to that firm's high rate of delivery delinquencies on contracts it held with Kelly AFB. Award was then made to L&S Machine Company, the next low quoter with a unit price of $355.35.

The determination of a prospective contractor's responsibility is the duty of the contracting officer. In making the determination, he is vested with a wide degree of discretion and business judgment. Generally, we will not question a nonresponsibility determination unless the protester can demonstrate bad faith by the agency or a lack of any reasonable basis for the determination. *S.A.F.E. Export Corporation,* B-203346, January 15, 1982, 82-1 CPD 35.

The contracting officer's nonresponsibility determination indicates that he reviewed Amco's current performance record at the Logistics Center's contracting office and at the Defense Contract Administration Services Management Area (DCASMA), San Antonio. He found that the Center's records indicated an Amco delinquency rate of 70 percent based on the total number of contract line items due at Kelly Air Force Base, while DCASMA's figures showed a total delinquency rate of 26 percent from January 1 through March 31, 1982. DCASMA's rate was based on the total number of contracts where a delinquency existed rather than the total number of contract line items. Based on both of these figures and the fact that Amco's poor prior performance record caused it to be included on the contracting agency's Contractor Experience Information Index (an index of firms which because of their prior performance needed special attention), the contracting officer determined that Amco was not a responsible offeror.

Amco challenges the accuracy of the Center's delinquency figures. The protester argues that the method used by the Center to calculate the 70 percent figure was faulty and states that many of the delinquencies listed were in fact the Government's fault. We have reviewed the rather voluminous record submitted by the protester and find that while some of the delinquencies listed may arguably have been the agency's fault, there is no question that

[1] The contracting officer did not refer the question of Amco's responsibility to the Small Business Administration (SBA) for consideration under the Certificate of Competency (COC) procedures. This action was consistent with Defense Acquisition Regulation § 1-705.4(c) (DAC 76-24, August 28, 1980), which provides that such referral shall not be made where small purchase procedures are used. We have previously held that a contracting agency, at least in the absence of SBA agreement, may not itself decide to avoid the referral requirement in the Small Business Act, 15 U.S.C. § 637(bX7) (Supp. IV 1980). See *Z.A.N. Co.,* 59 Comp. Gen. 637 (1980), 80-2 CPD 94; *J.L. Butler,* 59 Comp. Gen. 144 (1979), 79-2 CPD 412; *The Forestry Account,* B-193089, January 30, 1979, 79-1 CPD 68. The protester has not objected to the contracting officer's failure to refer the matter to SBA, however. Moreover, subsequent to the award made in this case, the SBA provided by regulation that "it is within the discretion of the contracting officer to determine if a referral should be made when the contract value is less than $10,000." 47 Fed. Reg. 34973, to be codified at 13 C.F.R. § 125.5(d). Under these circumstances, we will not object to the failure to refer. Since there was no review of the nonresponsibility determination by SBA, the matter is appropriate for our own review. See, e.g., *Indian Made Products Company,* B-186980, November 17, 1976, 76-2 CPD 427.

Amco has had significant problems in meeting its delivery obligations on many items. Amco, in fact, does not deny that some of its contracts are delinquent.

Amco argues, however, that its delinquency rate is no worse than any of the other contractors in its area doing similar work for Kelly Air Force Base. It states that the contracting officer acted in bad faith by singling Amco out for unfair treatment while other contracting officers within the same contracting activity have found Amco responsible and have continued to award it contracts.

We do not agree that the fact that Amco has been found responsible by other contracting officers indicates that the contracting officer here acted in bad faith. Responsibility determinations are made based upon the circumstances of each procurement which exist at the time the contract is to be awarded. These determinations are inherently judgmental, and two people can reach opposite conclusions as to a firm's responsibility based on the same facts without either acting in bad faith. *GAVCO Corporation—Request for Reconsideration,* B-207846.2, September 20, 1982, 82-2 CPD 242.

Amco is also concerned by its inclusion on the contracting agency's Index. The inclusion of a firm on the Index does not constitute a nonresponsibility determination, as evidenced by the awards Amco has received despite its inclusion on the Index. The Index is merely a management tool used by the Center, and the issue of whether a particular firm should be on the Index is a matter to be determined by the agency and is not the proper subject of a protest to our Office.

In sum, the contracting officer based his conclusion on both the delinquency rate supplied by DCASMA (which the protester does not seem to question) and that calculated by the contracting activity. Considering the informal nature of the procedures required in conducting this small purchase and the low value of this procurement, we think that the contracting officer acted reasonably in relying on the figures supplied by both these activities as a basis for his nonresponsibility determination and that the protester has not met its burden of establishing that the contracting officer acted arbitrarily or in bad faith.

The protest is denied.

[B-207710]

Compensation—Overtime—Firefighting—Fair Labor Standards Act—Court Leave—Jury Duty

Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay.

Matter of: Overtime Compensation for Firefighters, February 28, 1983:

This action is in response to a request from Mr. Gordon E. Grainger, President, Local 977, National Federation of Federal Employees, for a decision concerning the entitlement of firefighters at George Air Force Base, California, to additional premium pay when their overtime entitlement under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, is reduced due to court leave for jury duty during their regularly scheduled tour of duty. This matter has been presented under our procedures set forth at 4 C.F.R. Part 22 (1982) for decisions on appropriated fund expenditures which are of mutual concern to agencies and labor organizations. For the reasons set forth below, firefighters who are absent from work during their tour of duty while on court leave are entitled to receive the same amount of pay which they would otherwise receive for working their regularly scheduled 144-hour tour of duty in a biweekly work period.

The submission indicates that the firefighters at George Air Force Base are regularly scheduled to work a tour of duty of 144 hours in each biweekly work period and that they receive overtime compensation under the Fair Labor Standards Act for those hours in excess of 108 hours in their biweekly tour of duty. Local 977 further indicates that if a firefighter spends 8 hours performing jury duty (presumably during a regularly scheduled tour of duty) he would lose overtime compensation under the Fair Labor Standards Act for 8 hours for that biweekly work period since the 8 hours on court leave would reduce the hours on duty in the biweekly work period) from 144 to 136 hours. They contend that since 36 hours (in excess of 108 hours per biweekly work period) are scheduled as part of the employee's 144-hour tour of duty, the overtime compensation for hours in excess of 108 hours should not be lost as a result of the performance of jury duty which reduces the total number of hours during which the firefighters are on duty in a biweekly work period.

They call our attention to title 5, United States Code, and remind us that for covered employees overtime entitlement must be considered under both the Fair Labor Standards Act and title 5, with the

employee receiving the greater benefit. See paragraph 5 of Federal Personnel Manual Letter 551-5, January 15, 1975.

In a previous consideration of overtime entitlement of firefighters the Civil Service Commission (now Office of Personnel Management) advised us that, as a general practice, a Federal firefighter is scheduled for a tour of duty of 72 hours per week consisting of three 24-hour shifts. During each 24-hour shift the firefighter is normally in a work status for 8 hours and in a standby status, which includes a designated sleep period, for the remaining 16 hours. For this extended tour of duty, a firefighter receives, under title 5, United States Code, his basic rate of pay and premium pay on an annual basis for the standby duty, normally 25 percent of his basic rate of pay as authorized by 5 U.S.C. 5545(c)(1). See 55 Comp. Gen. 908 (1976). In the absence of information to the contrary we will assume that for each biweekly work period the firefighters at George Air Force Base work six 24-hour shifts. Furthermore, since the submission clearly indicates that the firefighters have not been authorized compensation for regularly scheduled overtime under 5 U.S.C. 5542(a), we will assume that they receive annual premium pay under 5 U.S.C. 5545(c)(1) for regularly scheduled standby duty.

Subsection 6(c)(1)(A) of the Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, 88 Stat. 60, added subsection 7(k) to the Fair Labor Standards Act, 29 U.S.C. 207(k), extending compensation benefits to firefighters. Subsection 207(k) of title 29, United States Code, provides that in a work period of 28 consecutive days the employee is entitled to compensation at a rate not less than one and one-half times the regular rate for all hours his tour of duty exceeds the lesser of 216 hours or the average number of duty hours (as determined by the Secretary of Labor) for employees engaged in such activities in calendar year 1975. The 216-hour standard for overtime entitlement for a work period of 28 consecutive days is applicable to firefighters. See Federal Personnel Manual (FPM) Letter 551-16, January 15, 1980. For any work period between 7 and 28 days overtime compensation is paid on the basis of the same ratio of maximum non-overtime hours and days in the work period. See FPM Letter 551-16, *supra.* Thus, as stated in the submission, firefighters are entitled to overtime compensation under the Fair Labor Standards Act for those duty hours in excess of 108 hours in a biweekly work period. Pursuant to its statutory authority at 29 U.S.C. 204(f) to administer the Fair Labor Standards Act with respect to most Federal employees, the Office of Personnel Management has issued instructions for applying the Fair Labor Standards Act to firefighters which appear in FPM Letter 551-5, January 15, 1975.

Only those hours that the employee is actually on duty during the tour of duty are included in hours worked under the Fair Labor Standards Act and paid time off is not included as hours

worked. See paragraph C7, Attachment 2 to FPM Letter 551-5, January 15, 1975, and 5 C.F.R 511.401(b) (1982). Thus, we have been asked whether the firefighters are to lose the compensation which they would otherwise receive for their regularly scheduled 144-hour tour of duty as a result of an absence on court leave which has reduced the amount of overtime compensation payable under the Fair Labor Stadards Act.

The statutory authority for court leave, 5 U.S.C. 6322, provides in pertinent part that an employee "* * * is entitled to leave, without loss of , or reduction in, pay * * *" during a period of absence for service as a juror. A similar provision pertaining to Federal employees on military leave who are engaged in training in the Reserves and National Guard is set forth at 5 U.S.C. 6323.

In view of the Office of Personnel Management's authority to administer the Fair Labor Standards Act with respect to Federal employees, including firefighters, we requested their views on this matter. In its report of January 10, 1983, the Office has called to our attention the Civil Service Commission letter of September 7, 1976, to the Department of the Navy. That letter states the opinion that absences on court leave are not included as worktime under the Fair Labor Standards Act. Thus, the Commission held that an absence on court leave during a firefighter's regularly scheduled tour of duty would reduce his actual time on duty and therefore result in a reduction to this entitlement to overtime pay under the Fair Labor Standards Act. The Commission concluded that such a result was not in conflict with the court leave provision set forth at 5 U.S.C. 6322 since "hours of work" determinations are made separately under the appropriate provisions of the Fair Labor Standards Act and title 5, United States Code, and since a Federal employee must have legal entitlement to pay under the applicable law upon which the pay entitlement is based. In its report of January 10, 1983, the Office of Personnel Management has reaffirmed this view. Thus, that Office concludes that 5 U.S.C 6322 provides authority to pay a Federal firefighter his full basic pay and title 5 premium pay for standby duty in a pay period during which he is excused for jury duty. However, it finds that 5 U.S.C. 6322 does not provide a legal basis for paying Fair Labor Standards Act overtime pay for periods of absence on jury duty when actual work is not performed.

We agree with the statement made by the Office of Personnel Management that the Fair Labor Standards Act sets minimum standards to protect employees and we acknowledge that the Office is responsible for the implementation of the Fair Labor Standards Act for Federal employees. However, we are responsible for the interpretation of the provisions of title 5, United States Code. We cannot ignore the plain wording of 5 U.S.C. 6322. Under that provision an employee is entitled to leave for jury duty without reduction or loss of pay. A similar provision at 5 U.S.C. 6323 pertains to

Federal employees on military leave who are engaged in training in the Reserves and National Guard. The requirement in these provisions is that an employee shall receive the same compensation he otherwise would have received but for the fact that he was absent on military or court leave. 27 Comp. Gen. 353, 357 (1947). There is nothing in the language of 5 U.S.C. 6322 which restricts its application to compensation otherwise payable under title 5, United States Code, and we are not aware of anything in the legislative history of that provision which would compel such a restrictive view. Furthermore, that provision does not require that an employee meet the applicable statutory criteria for compensation during a period of court leave, but provides that the compensation of the employee shall not be diminished by such absence.

The firefighters at George Air Force Base are regularly scheduled to work a 144-hour tour of duty in each biweekly work period. Although the firefighters' entitlement to overtime compensation under the Fair Labor Standards Act is reduced for those biweekly work periods in which they are on court leave during their regularly scheduled tour of duty, the court leave provision, 5 U.S.C. 6322, provides authority to pay them the same pay as they otherwise would receive under the Fair Labor Standards Act. Accordingly, under the authority of 5 U.S.C. 6322 the firefighters are entitled to the same amount of pay which they would otherwise receive for their regularly scheduled tour of duty in a biweekly pay period notwithstanding periods of court leave.

[B-207771, *et al.*]

Contracts—Damages—Liquidated—Actual Damages *v.* Penalty—Price Deductions—Reasonableness

Performance Requirements Summaries in invitations for bids (IFBs) for services contracts which permit the Government to deduct from the contractor's payments an amount representing the value of several service tasks where a random inspection reveals a defect in only one task imposes an unreasonable penalty, unless the agency shows the deductions are reasonable in light of the particular procurement's circumstances.

Regulations—Compliance—Failure To Comply—Regulations for Government's Benefit—Contract Protests

Air Force regulation concerning the development of a statement of work and quality assurance plan for base-level services contracts implements Air Force policy and is for the benefit of the Government, not potential offerors. Therefore, the Air Force's alleged failure to comply with the regulation does not provide a basis for protest.

Bids—Invitation For Bids—Clauses—Inspection of Services—Price Reduction *v.* Reperformance Provisions—Reconcilability

Performance Requirements Summaries in IFBs for services contracts which permit the Government to deduct amounts from the contractor's payments for unsatisfactory services do not conflict with any reperformance rights of the contractor. Al-

though the standard "Inspection of Services" clause permits the Government to require reperformance at no cost to the Government, the protester had failed to show that defective services may be reperformed without the Government receiving reduced value.

Matter of: Environmental Aseptic Services Administration and Larson Building Care Inc., February 28, 1983:

Environmental Aseptic Services Administration and Larson Building Care Inc. have submitted a number of protests [1] concerning the methodology employed by the Air Force to acquire various base-level services, including hospital housekeeping, custodial services, grounds maintenance and stocking commissary shelves. The thrust of the protests is that the invitations for bids implement a quality assurance program that allegedly permits payment deductions for unsatisfactory service greatly exceeding the value of the services.

We sustain the protests on the basis that the quality assurance provisions provide for unreasonable deductions.

The protesters also complain that these provisions provide for permanent deductions without regard to alleged reperformance rights of the contractors. We find this basis of protest to be without merit.

All the invitations apparently incorporated by reference the standard Inspection of Services clause contained in Defense Acquisition Regulation (DAR) § 7-1902.4 (1976 ed.). The clause generally must be included in all Air Force fixed price service contracts. *See* DAR § 7-1902. It reserves the Government's right to inspect all services, to the extent practicable, at all times during the contract term, and also provides as follows:

> If any services performed hereunder are not in conformity with the requirements of this contract, the Government shall have the right to require the Contractor to perform the services again in conformity with the requirements of the contract, at no additional increase in total contract amount. When the services to be performed are of such a nature that the defect cannot be corrected by reperformance of the services, the Government shall have the right to (i) require the Contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the contract; and (ii) reduce the contract price to reflect the reduced value of the services performed. • • •

The invitations contain additional provisions under the heading Performance Requirements Summary (PRS) that permit the Government to sample the contractor's performance of some services randomly and deduct payments for unsatisfactory service in an amount calculated to represent the value the unsatisfactory service bears to all the contract's requirements. To determine that value, the PRS breaks the total contract effort down to its basic component services. The value of unsatisfactory performance under a component service is determined by calculating the percentage any sampled unsatisfactory performance bears to the size of the entire

[1] These protests are identified in the Appendix (which is not included in this publication).

sample, and then multiplying it times a fixed percentage listed in the IFB which represents the value of the component service in comparison with the total contract effort. In some instances, however, the invitations provide an allowable deviation for which the Government will not take any deductions.

For example, an IFB for hospital housekeeping services establishes a format for randomly inspecting room cleaning (only one of several services required by the IFB) where the contractor must clean 236 rooms daily and the sample unit is one room on any given day. If we assume the following:

(a) The contract price for the performance period being sampled, *e.g.*, 1 month, is $10,000;

(b) The IFB fixes the relative value of room cleaning at 60 percent of the total contract, or $6,000 of the total contract price;

(c) The Government samples 200 room cleanings out of the possible 7080 cleanings in the month (236 rooms$\times$30 days); and

(d) The Government's random sampling procedures reveal defects in 40 room cleanings, then the deduction would be as follows:

[40 (defects)$\div$200 (sample size)]$\times$.60 (percentage value of room cleaning)$\times$$10,000 (total price)=$1,200.

The PRS provisions state that these deductions are permanent, but the Government nevertheless can require the contractor to reperform the unsatisfactory services. Concerning only those services not surveyed by sampling, the PRS provides that a defect will not be counted when the service can be reperformed in a timely manner. Neither the PRS nor any other IFB provision defines random sampling, however, so that it apparently could involve the Government's inspection of one unit or all the units in a lot. The IFB contains an informational copy of the Quality Assurance Evaluator (QAE) Surveillance Plan detailing the sampling procedures, including a statistical basis for determining the frequency of inspections and the size of the sample.

The protesters have two basic complaints regarding the PRS's methodology. The first is that the sampled service often subsumes several required tasks, and the contractor's failure to perform satisfactorily any one of these tasks provides a basis to deduct payment for all of the tasks. Using the room cleaning example, the QAE Surveillance Plan establishes a checklist of 14 items (*e.g.*, aseptic floor, furniture, fixtures, drapes, and trash) representing different tasks required by the IFB, and the PRS provides, "If a task fails, the room fails for that day." In other words, if the contractor unsatisfactorily performs only one task in each of the 40 rooms, he will suffer the same deduction as though he failed to perform all 14 tasks in each room. Thus, any deductions will be based on the value of all 14 tasks and will greatly exceed the value of the one task (trash collection, for example) actually failed. The protesters

allege that these deductions violate the Air Force's own policy directives contained in Air Force Regulation 400-28, Vol. I, September 26, 1979, and exceed the agency's needs. They contend that the contractor's increased monetary risks occasioned by the deductions for an entire service will increase the overall cost to the Government, presumably through higher bid prices and decreased competition. In this regard, we note that Larson was apparently unwilling to take the risks involved and did not submit bids under the IFBs involved.

Secondly, the protesters complain that the IFBs also permit the Government to require reperformance at the contractor's expense in the case of sampled services. The protesters contend that the standard Inspection of Services clause (quoted above) and standard specification No. MIL-STD-1050, April 29, 1963 (MIL. SPEC.), which is mandatory for use by the Department of Defense, DAR § 1-1202(a)(ii), give the contractor general rights to reperform services after deficiences are noted, subject to reinspection before the Government can reduce the contractor's payments. In particular, the protesters rely on the following MIL. SPEC. provision as establishing a contractor's right to reperformance without deduction:

> Rejected units may be repaired or corrected and resubmitted for inspection with the approval of, and in the manner specified by, the responsible authority. Paragraph 6.2.

The Air Force really does not address the protesters' complaint that the IFBs permit deductions which are unreasonably excessive, except to suggest this issue involves a matter of contract administration which this Office should not review. We disagree.

Although a contractor, during performance, may challenge deductions pursuant to the disputes clause of the contract, that does not mean potential bidders cannot protest the validity of solicitation clauses which may violate procurement principles. While we recognize that the establishment of inspection procedures to insure that services will meet the Government's needs is primarily the responsibility of the contracting agencies, we will question determinations about the provisions included in a solicitation for this purpose if the provisions are shown to restrict competition unduly or otherwise violate procurement statutes and regulations. *Inflated Products Company, Inc.*, B-190877, March 21, 1978, 78-1 CPD 221.

For reasons stated below, we believe the IFB's quality assurance provisions violate applicable procurement regulations contained in DAR § 1-310, concerning liquidated damages. The alleged violations of Air Force Regulation 400-28, however, are another matter. This regulation prescribes the methodology for developing the statement of work and a quality assurance plan for base-level services contracts, and implements Air Force policy concerning these matters. The regulation thus sets out instructions clearly for the benefit of the Government, not potential offerors, and the agency's

alleged failure to comply with it does not provide a basis for protest. See *Moore Service, Inc., et al.* B-204704.2, B-204704.3, B-205374, B-205374.2, June 4, 1982, 82-1 CPD 532; *Westinghouse Information Services,* B-204225, March 17, 1982, 82-1 CPD 253.

Liquidated damages are fixed amounts which one party to a contract can recover from the other upon proof of violation of the contract, and without proof of the damages actually sustained. See *Koth* v. *R.C. Taylor Trust,* 280 U.S. 224 (1930). While a liquidated damages provision obviously benefits the Government in that it permits contract deductions as described, DAR § 1-310 imposes certain limitations on the use of liquidated damages that clearly are for the contractor's benefit.

The regulation limits the use of such damages to instances where the time of performance is such an important factor that the Government may reasonably expect to suffer damages if the performance is delinquent, and the extent or amount of such damages would be difficult or impossible to ascertain or prove. DAR § 1-310(a). The regulation further provides that when a liquidated damages clause is used, the contract must set forth the amount to be assessed against the contractor for each calendar day of delay, and the rate must be reasonable in light of the procurement requirements. DAR § 1-310(b). Finally, the regulation expressly recognizes that liquidated damages fixed without reference to probable actual damages may be held to impose a penalty and therefore be unenforceable. DAR § 1-310(b). In this respect, while such damages might add an effective spur to satisfactory performance, it is well-settled that such a penalty to deter default is improper and unenforceable. *Priebe & Sons* v. *United States,* 332 U.S. 407 (1947).

We will object to a liquidated damages provision as imposing a penalty if a protester shows there is no possible relation between the amounts stipulated for liquidated damages and the losses which are contemplated by the parties. 46 Comp. Gen. 252 (1966); *Massman Construction Co.,* B-204196, June 25, 1982, 82-1 CPD 624. We believe the protesters initially met this burden by showing that the solicitation provisions permit deductions without regard to, and significantly in excess of, the value of tasks actually found defective. In the example of the hospital housekeeping services invitation, the IFB's QAE Surveillance Plan lists 14 tasks which comprise room cleaning, fixes the value of these tasks at 60 percent of the contract price, and the PRS authorizes a deduction for the *entire* room cleaning service if the contractor fails to perform any *one* of the tasks. The protesters point out that under circumstances very similar to this example, the Armed Services Board of Contract Appeals held that the Government's "all or none" inspection procedure, employed to inspect rooms serviced under a custodial services contract, imposed an unfair and unreasonable penalty. *Clarkies, Inc.,* ASBCA No. 22784 (1981), 81-2 BCA ¶ 15,313.

It therefore is incumbent on the Air Force to show, in response to the protester's showing, that there indeed is a reasonable basis for its measure of damages. *Cf. Professional Helicopter Services,* B-202841, B-203536, March 17, 1982, 82-1 CPD 251 (concerning the Government's burden to present a reason why an apparently restrictive specification was necessary). We recognize that not all contract tasks may have the same importance, and that some tasks may be of such importance that a deduction for an entire service would be warranted, rather than simply a pro rata amount, if the task is not performed properly. For instance, a contractor's failure to perform a single cleaning task in surgical or ward areas may render the entire room unsatisfactory because of the critical need for hygiene in those areas, whereas failure to perform one task in an administrative area should have no such effect. The IFB for hospital services, however, draws no distinction between surgical or ward areas and administrative areas for purposes of deductions.

The Air Force's failure to respond to these protests with a rationale as to why defective performance of any task in a service, without regard to the nature or seriousness of the task, warrants deduction for the entire service compels us to conclude that the IFB provision in issue imposes a penalty as to nonvital tasks and would, as the protesters indicate, unnecessarily raise the Government's costs and have an adverse effect on competition. We therefore sustain the protest to that extent.

Regarding the alleged inconsistency between provisions permitting permanent deductions and alleged reperformance rights established in the standard Inspection of Services clause and the mandatory MIL. SPEC., we believe the protesters have not established the existence of such rights concerning randomly sampled services under any of the procurements in issue here.

The Inspection of Services clause gives the Government the right, where performance is unsatisfactory, to require reperformance at no additional increase in the contract amount, and to reduce the contract price to reflect the reduced value of the services performed when the services "are of such a nature that the defect cannot be corrected by reperformance of the services." The clause does not expressly bestow any rights on the contractor, and

explicitly recognizes that circumstances may exist where reperformance would not correct a deficiency. The clause thus reserves, for that situation, the Government's right "to (i) require the contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the contract; *and* (ii) reduce the contract price to reflect the reduced value of the services performed." [Italic supplied.]

We find nothing in the MIL. SPEC. which detracts from this right. Paragraph 6.2, on which the protesters rely, does not require that the Government permit reperformance without regard to the circumstances; rather, it simply allows the Government to permit reperformance.

Therefore, the critical question is whether the services here may be reperformed after random sampling so that the Government does not receive reduced value. The Air Force contends that while defective services may be reperformed to bring them up to contract standards, the standards are thus achieved in an untimely manner, and time of performance is an important part of the IFBs' requirements. Moreover, when a contractor reperforms a sampled service, it cannot correct the entire lot to meet the quality and time requirements of the contract. Therefore, the Air Force argues, it has the right to deduct payments to reflect the reduced value of the services performed. In this respect, the Air Force also points out that the IFBs require the contractor to establish a quality assurance plan for which the Air Force presumably must pay. Any defect revealed during sampling indicates the contractor's failure to administer its plan properly, and represents a further reduction in value to the Government.

The protesters, who bear the burden of submitting sufficient evidence to establish their case, see *Line Fast Corporation,* B-205483, April 26, 1982, 82-1 CPD 382, have not shown that, under the IFBs involved here, defective services may be reperformed without the Government's receiving reduced value for them. We therefore must accept the agency's position. See *Alan Scott Industries—reconsideration,* B-201743, *et al.,* April 1, 1981, 81-1 CPD 251. Accordingly, the protests lack merit in their contentions that the deductions provisions are inconsistent with reperformance rights under the IFBs.

The protests are sustained in part concerning the provisions that permit allegedly excessive deductions. We are recommending to the Secretary of the Air Force that the deduction provisions be examined to determine where individual tasks are so vital as to warrant a deduction for the entire service. Where bids have not been opened, we are recommending that the Air Force amend the IFBs to differentiate between vital and non-vital tasks and to establish reasonable deduction rates for non-vital tasks, *e.g.,* a pro rata deduction in the same proportion as the task bears to the total number of tasks comprising the service. Where contracts have been awarded, or where bids have been opened and the needs of the agency do not readily permit canceling an IFB and reissuing a revised one, we are pointing out to the Air Force that in administering the contracts it should avoid taking unreasonable deductions for non-vital tasks but instead should pursue its other remedies under the contract so that it will not run the risk of implementing the deduction provisions in a manner that imposes a penalty.

The protests are denied concerning alleged conflicts between provisions that permit deductions and alleged reperformance rights.

[B-208353]

Pay—Retired—Non-Regular Service—Post-Age 60 Application—Date of Pay Accrual—*Garcia* Case

A service member filed an application for non-Regular retired pay under 10 U.S.C. 1331 almost 6 years after meeting the age requirement, but retired pay was not granted because records did not show he had sufficient years of service. Upon his submission of additional proof, it was determined that he had sufficient service. Although more than 6 years elapsed between his meeting the age requirement and the determination that he was eligible for retired pay, none of his retroactive retired pay is barred by 31 U.S.C. 71a (now sec. 3702(b)), in view of *Garcia* v. *United States,* 617 F. 2d 218 (Ct. Cl. 1980), since such claims will now be deemed to accrue only after the service's determination that the claimant has the required service.

Matter of: Captain James E. Finigan, USAR, March 1, 1983:

This action is in response to a request for a decision whether the provisions of the barring act, 31 U.S.C. § 71a (now 31 U.S.C. § 3702(b)), are applicable to the entitlement of Captain James E. Finigan, USAR, to receive retired pay under the provisions of 10 U.S.C. §§ 1331–1337, for the period September 2, 1971, through October 16, 1973. The answer to that question depends on whether notification to a service member under 10 U.S.C. § 1331(d) that he has completed all required service is a condition precedent to the running of the barring act. We have determined that notification by the service that the required service has been complete is necessary before the barring act begins to run.

This matter was submitted by the Disbursing Officer, Army Finance and Accounting Center, and has been assigned submission No. DO–A–1403 by the Department of Defense Military Pay and Allowance Committee.

The facts are not in dispute. Captain James E. Finigan became 60 years of age on September 2, 1971, and apparently became eligible to receive retired pay for non-Regular service under the provisions of 10 U.S.C. §§ 1331–1337 at that time. However, he did not file the required application with the Army for such pay until June 23, 1977.

In response to his application, he was advised by the Retired Activities Directorate, Reserve Components Personnel and Administrative Center, St. Louis, that they could not substantiate that he performed the minimum number of qualifying years of service. They could only account for 17 years, 7 months and 12 days of service and advised him that, if he had performed additional service, the records to support such service were probably among those which had been destroyed by the fire which occurred in the Administrative Center several years before.

Apparently in 1978 Captain Finigan submitted copies of documents to support his entitlement. By correspondence from the Army Finance and Accounting Center, dated October 9, 1979, he was advised that an examination of his retired pay account had been made, that he would be paid monthly retired pay, and that he

was due retired pay retroactively to September 1971 when he became age 60. But, since more than 6 years had elapsed since he first became eligible to receive retired pay, he was advised that certification for payment of the retroactive amount would have to be made by the General Accounting Office, and he was provided the appropriate information for filing his claim.

His claim was first received in the General Accounting Office on October 17, 1979, and by correspondence dated October 25, 1979, our Claims Division notified the Army Finance and Accounting Center that payment of retired pay to Captain Finigan for the period prior to October 17, 1973, was barred by 31 U.S.C. § 71a, which bars claims not received in the General Accounting Office within 6 years of the date they first accrue. The Army now requests review of that ruling.

It is noted in the submission that 10 U.S.C. § 1331(d) provides that a member is to be notified upon completion of 20 years of service that he has completed the minimum years of service required for eligibility. It is pointed out that due to administrative error Captain Finigan was never given that notification. Had such notice been timely sent, his 1977 application would have been accepted without question.

Where a right of action is dependent on the occurrence of an event or contingency, the right does not accrue and the statute of limitations does not begin to run until the event or contingency occurs. 20 Comp. Gen. 734, 738 (1941). This rule has been applied, for example, to circumstances where by statute a claim is not payable until its validity has been determined by a designated Government agency. In such situations, we have held that, for the purpose of 31 U.S.C. § 71a, the claim does not accrue until the required determination has been made. 34 Comp. Gen. 605 (1955), and 50 *id.* 607 (1971). With regard to the similar application by the Court of Claims of their statute of limitations (28 U.S.C. § 2501), see *Friedman* v. *United States*, 159 Ct. Cl. 1 (1962).

As the foregoing relates to the case of Captain Finigan, 10 U.S.C. § 1331, which authorizes non-regular retirement, provides in part in subsection (a) that:

> (a) * * * a person is entitled, upon application, to retired pay * * * if—
> (1) He is at least 60 years of age;
> (2) He has performed at least 20 years of service * * *;
> (3) He performed the last eight years of qualifying service * * * not while a member of a regular component, the Fleet Reserve, or Fleet Marine Corps Reserve; and
> (4) He is not entitled, under any other provisions of law, to retired pay from an armed force * * *.

Subsection (d) of 10 U.S.C. § 1331 was added by section 1 of the act of October 14, 1966, Public Law 89-652, 80 Stat. 902. Subsection (d) reads as follows:

> (d) The Secretary concerned shall provide for notifying each person who has completed the years of service required for eligibility for retired pay under this chapter.

The notice must be sent, in writing, to the person concerned within one year after he has completed that service.

Public Law 89-652 also added 10 U.S.C § 1406 which provides that once a person has been notified of his eligibility for retired pay, in accordance with 10 U.S.C § 1331(d), the eligibility may not be denied or revoked due to any error, miscalculation, misinformation or administrative determination of years of service performed.

The Navy Department in its report of June 6, 1966, on the need for H.R. 5297, which became Public Law 89-652, stated that the complicated method of computing creditable service for non-regular retirement under chapter 67 (10 U.S.C. § 1331)—

> * * * usually leaves the reservist in serious doubt as to whether he has in fact passed the 20-year milestone. The services, by a variety of administrative procedures, have attempted to keep the reservist informed of his progress and his completion of the years of service required. In some cases, however, reservists have received erroneous information or have miscomputed their years of service and in reliance thereon have reduced their Reserve participation only to find upon reaching retirement age that they have not in fact met the 20 years of service requirement. When the errors are not discovered until at or near retirement age the reservists no longer have time to renew their participation and acquire the necessary additional service. Page 3 of H. Rept. No. 1689, and page 2 of S. Rept. No. 1693, 89th Cong., 2nd. Sess.

The primary purpose of Public Law 89-652 was to place the burden on the services to notify reservists when they have met the years of service requirement.

In paying retired pay under 10 U.S.C §§ 1331-1337, we have applied the barring act on the basis that such pay accrues when the individual meets the statutory requirements of age and service. See 38 Comp. Gen. 146 (1958); 37 *id.* 653 (1958); and 35 *id.* 646, 647 (1956). However, we have also recognized that such entitlement is dependent upon approval by the service concerned of the person's application, and upon such approval payment is to be made retroactively to the date of eligibility. 38 Comp. Gen. 146, 149.

A situation somewhat similar to that of Captain Finigan was recently considered by the Court of Claims in the case of *Garcia* v. *United States*, 617 F.2d 218 (Ct. Cl. 1980).

The stipulated facts in that case were that in October 1967 the service member became 60 years of age and, but for the filing of his application for non-Regular retired pay, was fully qualified for that pay under 10 U.S.C. §§ 1331-1337. In May 1974 he finally made application for retired pay. In August 1974, he was advised that his application was rejected because a review of his records failed to show that he had performed sufficient satisfactory service. He was further advised that if he believed the Army's records of his service were incorrect, he should furnish additional proof of eligibility, and that he could appeal the administrative denial to the Army Board for the Correction of Military Records. In September 1974 he filed a petition with the Correction Board. In October 1976, without the Board having taken any formal action, the Army informed the plaintiff that his records had been further reviewed and

that it had been determined that he had in fact performed the requisite 20 years of satisfactory service and, thus, was eligible to receive retired pay.

The matter of that entitlement was submitted to our Office for certification and was received here on October 18, 1976. Our Claims Division concluded that because his record was adjusted administratively due to the discovery of error, and not by formal correction action by the Correction Board, no new cause of action or claim arose. Therefore, since the entitlement to retired pay arose in 1967, based on the provisions of 31 U.S.C § 71a, payment of retired pay for the period before October 18, 1970, 6 years prior to receipt of the claim in our Office, was not authorized.

One of the issues considered by the Court of Claims in *Garcia* was the applicability of the statutory bar contained in 28 U.S.C. § 2501 to actions filed in that court. The court took the position that, in view of the requirements of 10 U.S.C. § 1331(d) and 10 U.S.C. § 1406, a determination of eligibility by the service is a condition precedent to the receipt of retired pay under 10 U.S.C. §§ 1331-1337. Thus, the court held that the plaintiff's cause of action did not accrue until the service made the determination that he was eligible for retired pay and advised him of that determination in October 1976. Since he had filed action in the court within 6 years of that date, the court granted him judgment for all retired pay otherwise due him subsequent to his 60th birthday.

In view of the *Garcia* case and in view of our position that, where a claim is dependent upon any agency determination required by statute, such determination is a condition precedent to the accrual of the claim for the purposes of the barring act, we will consider the claim not to have accrued until the service's determination that the person has the qualifying service for retired pay under 10 U.S.C. § 1331. In Captain Finigan's case the final condition was not met until October 1979 when the determination was made that Captain Finigan had the required service. Since his claim was received in our Office within 6 years of that time, no part of his retired pay entitlement is barred.

Accordingly, payment may be made to Captain Finigan for the retired pay found due for the period September 2, 1971, through October 16, 1973, if otherwise correct.

[B-209493]

Officers and Employees—Contracting With Government—Public Policy Objectionability—Regulation Restrictions—Violation Criteria—Military Procurements

Where contracting officer was unaware the awardee was employed by another Government agency on date of award, there was no violation of regulation against knowingly contracting with Government employee. Moreover, agency considered allegation when raised after award and determined that termination of contract for convenience of Government was not warranted since employment was terminated.

In addition, General Accounting Office (GAO) finds no evidence in the record of any favoritism toward awardee. In these circumstances, GAO concludes that there is no reason to disturb award.

Officers and Employees—Contracting With Government—Former Employees—Contracts With Other Than Former Employing Agency—Conflict of Interest Statutes—Inapplicability of 18 U.S.C. 207(c)

Contrary to protester's allegation, there is no blanket prohibition on contracts between the Government and a former employee for a period of at least 1 year after former employee has left Government employment. Provisions contained in 18 U.S.C. 207(c) (Supp. IV, 1980), as implemented by 5 C.F.R. 737.11 (1981), generally restrict certain kinds of contact between former senior Government employees and their former agencies and do not apply to situation at hand where former employee of Veterans Administration is awarded contract by Department of the Navy.

Matter of: Sterling Medical Associates, March 1, 1983:

Sterling Medical Associates (Sterling) protests against the Department of the Navy's award of a contract for radiology services to Patrick Haran, M.D., pursuant to solicitation No. N00140-82-R-9270. The basis for Sterling's protest is that Dr. Haran was a Government employee when awarded this contract and, therefore, he was not eligible for award under the Government's general policy of not contracting with Federal employees.

The record shows that Dr. Haran was employed at the Veterans Administration Medical Center in Clarksburg, West Virginia, at the time he submitted his proposal (July 2, 1982), as well as on the date of award (September 7, 1982). However, performance under the contract was not to commence until October 1. Sometime between contract award and October 1, Dr. Haran terminated his employment with the Veterans Administration in order to undertake his contractual duties.

Sterling protested to the contracting officer on September 22 and pointed out that Dr. Haran was an employee of the Veterans Administration. According to the Navy, the contracting officer was unaware of Dr. Haran's employment status until Sterling protested. However, Dr. Haran had attached his resumé to his proposal and it showed that he was so employed. After being informed by Sterling that Dr. Haran was a Government employee, the contracting officer consulted with Navy counsel and determined that termination would not be in the best interest of the Government. This determination was based primarily upon the fact that Dr. Haran was no longer a Veterans Administration employee. Sterling filed its protest in our Office on October 13, 1982.

Sterling contends that, in accord with Federal Government policy, former Government employees are prohibited from contracting with the Government for at least 1 year after they have left the Government. However, we are unaware of any blanket 1-year prohibition on contracts between the Government and its former employees. The only 1-year restriction of which we are aware is

contained in 18 U.S.C. § 207(c) (Supp. IV, 1980), as implemented by 5 C.F.R. § 737.11 (1981), which states that senior Government employees generally shall not "knowingly act as an agent or attorney for, or otherwise represent, anyone in any formal or informal appearance before, or with the intent to influence, make any written or oral communication on behalf of anyone to * * * his or her former department or agency * * * in connection with any particular Government matter * * * in which [the agency] has a direct and substantial interest." This restriction is not a concern in the present case because Dr. Haran's contract is with the Navy rather than the Veterans Administration, his former agency.

Contracts between the Government and its employees are not expressly prohibited by statute. 55 Comp. Gen. 681, 683 (1976). However, such contracts are considered subject to criticism from a public policy standpoint on the grounds of possible favoritism and preferential treatment. In this regard, section 1-302.6 of the Defense Acquisition Regulation (DAR) (1976 ed.) states:

(a) Contracts shall not knowingly be entered into between the Government and employees of the Government or business organizations which are substantially owned or controlled by Government employees, except for the most compelling reasons, such as cases where the needs of the Government cannot reasonably be otherwise supplied.

This protest presents a situation in which the contracting officer should have known that Dr. Haran was a Government employee because of the statement in the resumé attached to Dr. Haran's proposal. However, the contracting officer overlooked the statement in the resumé and did not actually become aware of Dr. Haran's employment status until after award had been made. Therefore, the contracting officer did not violate the above-quoted regulation by "knowingly" entering into the contract with a Government employee. *Biosystems Analysis, Inc.*, B-198846, August 25, 1980, 80-2 CPD 149. Furthermore, there is no evidence in the record of any favoritism towards Dr. Haran in this procurement. While Dr. Haran was a Government employee at the time of award, he worked for the Veterans Administration, not the Navy. Moreover, Dr. Haran terminated his employment with the Veterans Administration before he was to begin performance under this contract. In these circumstances, we see no reason to disturb the award to Dr. Haran. See *Biosystems Analysis, Inc., supra.*

The protest is denied.

[B-209790]

Appropriations—Availability—Contracts—Research and Development—Small Business Innovation Development Act—Operational *v.* R&D Activities

In calculating its 1983 set-aside for small business innovation research program, National Aeronautics and Space Administration should apply definition of "research and development" that appears in Small Business Innovation Development Act,

Pub. L. 97-219, 96 Stat. 217, July 22, 1982, to its budget for Fiscal Year 1983 without regard to appropriation heading "Research and Development." Since Congress clearly appropriated funds for certain operational activities under that heading, it would be contrary to congressional intent for set-aside to be based on amounts not available for research and development.

Matter of: NASA—Interpretation of Public Laws 97-219 and 97-272, March 3, 1983:

The Administrator of the National Aeronautics and Space Administration (NASA) has requested an advance decision concerning the application of the Small Business Innovation Development Act of 1982 (Act), Pub. L. No. 97-219, 96 Stat. 217, July 22, 1982, to NASA's operations.

That Act requires that agencies with "extramural budgets" for research and development (R&D) in excess of $100,000,000 per year set aside specified percentages of such budgets for award of contracts, grants or cooperative agreements to small business concerns participating in Small Business Administration approved small business innovation research (SBIR) programs.

The question presented by NASA is whether the SBIR set-aside in its case must be calculated as a percentage of the total funds appropriated under the account entitled "Research and Development" or whether it may be calculated instead by distinguishing between research and development activities and operational activities, both of which are included in the R&D appropriation, and applying the set-aside only to the funds identified in its budget submission for research and development. Depending on the figure selected, the amount of funds for the SBIR set-aside will be either $11.1 million or $3.3 million.

For the reasons discussed below, we conclude that the set-aside should be calculated by applying the required set-aside percentage only to programs within NASA's R&D appropriation which fit within the statutory definition of research and development in the Act.

Section 4(f)(1) of the Small Business Innovation Development Act of 1982, 15 U.S.C. 638(f)(1), provides as follows:

> Each Federal agency which has an extramural *budget* for research or research and development in excess of $100,000,000 for fiscal year 1982, or any fiscal year thereafter, *shall expend not less than 0.2 per centum of its extramural budget in fiscal year 1983* or in such subsequent fiscal year as the agency has such budget not less than .6 per centum of such budget in the second fiscal year thereafter, not less than 1 per centum of such budget in the third fiscal year thereafter, and not less than 1.25 per centum of such budget in all subsequent fiscal years with small business concerns in connection with a small business innovation research program which meets the requirements of the Small Business Innovation Act of 1982 and regulations issued thereunder * * * *Provided further,* that a Federal agency shall not make available for purposes of meeting the requirements of this subsection an amount of its extramural budget for basic research or research and development which exceeds the percentages specified herein. * * * [Italic supplied.]

"Research and development" and "extramural budget" are defined by section 4(e)(1) of section 4(e)(5) as follows:

The term "extramural budget" means the sum of the total obligations minus amounts obligated for such activities by employees of the agency in or through Government-owned, Government-operated facilities * * *;

* * * * * * *

The term "research" or "research and development" means any activity which is (A) a systematic intensive study directed toward greater knowledge or understanding of the subject studies; (B) a systematic study directed toward applying new knowledge to meet a recognized need; or (C) a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design development, and improvement of prototypes and new processes to meet specific requirements.

NASA's fiscal year 1983 appropriation for research and development, and for other purposes, is set out below:

Research and Development

For necessary expenses, not otherwise provided for, including research, development, operations, services, minor construction, maintenance, repair, rehabilitation and modification of real and personal property; tracking and data relay satellite services as authorized by law; purchase, hire, maintenance, and operation of other than administrative aircraft, necessary for the conduct and support of aeronautical and space research and development activities of the National Aeronautics and Space Administration; and including not to exceed (1) $1,769,000,000 for Space Shuttle, (2) $1,796,000,000: *Provided*, That the amount available for obligation or expenditure shall be reduced to the extent subsequent authorizations provide for transfers for Space Flight Operations, (3) $115,000,000 for Space Transportation Systems—Upper Stages, (4) $88,000,000 for Space Transportation Systems Operations—Upper Stages, (5) $137,500,000 for the Space Telescope, (6) $34,500,000 for the Gamma Ray Observatory, (7) $92,600,000 for Project Galileo, (8) $4,000,000 for a Space Station, (9) $55,000,000 for Performance Augmentation, without the approval of the Committees on Appropriations, $5,542,800,000, to remain available until September 30, 1984; *Provided*, That $280,000,000 shall be made available for aeronautical research and technology, that $192,000,000 shall be made available for design, development, procurement, and other related requirements of liquid hydrogen-liquid oxygen upper stages (Centaur): *Provided further*, That none of the funds in this or any other Act shall be used for the development of a fifth space shuttle orbiter without the approval of the Committees on Appropriations. Pub. L. No. 97-272, 96 Stat. 1169.

NASA historically has been essentially a research and development-oriented agency. The titles of its three appropriation accounts reflect this orientation. Its appropriations other than for "Research and Development," quoted above, in fiscal year 1983, are for "Construction of Facilities" and "Research and Program Management." The latter appropriation is for the operation of Government owned and operated facilities.

Concerning the R&D Appropriation, NASA itself, prior to fiscal year 1983, has consistently treated the entire amount of the appropriation, as well as all of the programs and activities specified therein, as research and development. For example, in response to our inquiry, the National Science Foundation informed us that NASA has always reported its "entire budget" in responding to an annual National Science Foundation survey entitled "Federal Funds for Research and Development." Similarly, the Office of Management and Budget informed us that "in the past, NASA has reported all of its activities as R&D for inclusion in the R&D Special Analysis [Special Analysis K] prepared each year by OMB as

part of the President's budget." In making their estimates of the gross amounts, Government-wide, that would be available for the SBIR program, the cognizant Small Business Congressional Committees used the amounts identified as R&D in prior year appropriations. *See, e.g.,* page 180 the Report of the Senate Small Business Committee, S. Rep. 97-194, September 25, 1982. Finally, in a report from the Small Business Administration on this question, the Acting Assistant Administrator for the Office of Innovation Research and Technology says that NASA should be bound by the fact that it submitted all the activities in the appropriation as R&D in its report to OMB on R&D activities in the budget.

In fiscal year 1983 budget submissions and related documents, and in the legislative history of NASA's fiscal year 1983 appropriation, however, there is a recognition that a number of programs, most notably the Space Shuttle program, had concluded their research and development phase and were now operational. For example, the Senate Appropriations Committee Report, S. Rep. 97-537, September 9, 1982, states at page 59:

* * * *The operational era of the Space Shuttle will be initiated in fiscal year 1983. Operational activities in fiscal year 1983 will support five flights and procurement assembly and checkout of the solid rocket boosters, external tanks, and other hardware for flights in subsequent years.* Production activities in fiscal year 1983 will feature the final preparations for the delivery of the third flight Orbiter and the operational modifications to the first orbiter vehicle. The development of a lighter-weight solid rocket booster will be pursued to provide additional performance for west coast launches of the Space Shuttle. The appropriation will also provide expendable launch vehicles and services to augment the Space Shuttle. [Italic supplied.]

The House Committee on Science and Technology also assumes the operational phase of the Space Shuttle program in its report, H. Rep. 97-502 (May 5, 1982), as follows:

Shuttle Operations

The major goals for the operational success of the Space Shuttle are establishing an adequate orbiter fleet, increasing the number of flights, decreasing turn-around time, and decreasing the cost per flight. NASA faces a major challenge in shifting the organizational and institutional bias from a research and development character to an operational character. NASA's success in meeting this challenge will depend largely on achieving self discipline within the agency in avoiding unnecessary engineering changes, in reducing duplication between government and contractor responsibilities and capabilities, and in evolving an acquisition strategy which makes maximum use of competitive procurements.

In its Special Analysis K, "Research and Development," OMB explains NASA's Space Shuttle activities as follows:

The Shuttle is expected to operate on a routine basis in 1983 to meet the needs of domestic and foreign users, who have already made significant investments in anticipation of its availabiity in the early 1980s. Also, regular Shuttle operations are important to meet civilian and national security commitments in a timely manner at the lowest total cost to the Nation. While the Shuttle is expected to replace the most expendable launch vehicles, the budget continues efforts to assure adequate expendable vehicle capacity until the Shuttle becomes fully operational.

With the second successful launch of the Space Shuttle orbiter, Columbia, the U.S. clearly demonstrated that a manned reusable space vehicle is feasible. The

1983 budget provides the funds needed to make possible a timely and effective operational Shuttle system.

The statements in the House and Senate reports, and in OMB's Special Analysis K, quoted above, were based on a detailed budget submission prepared by NASA, entitled "F.Y. 1983 Budget Plan." It listed separately extramural research and development, intramural research and development, and a variety of production and operation activities, described with considerable specificity. It appears that all activities which could reasonably fit the definition of extramural research and development set forth in the Act were listed under that heading in the Budget Plan. It was on the basis of the dollar figures associated with these activities that NASA calculated the total funds subject to the SBIR set-aside. (We note from NASA's submission to us that it has established an SBIR program at a higher level, based on the entire R&D appropriation account, while waiting for our decision.)

The anomaly of an appropriation account, headed "Research and Development," covering activities the majority of which are for "operations, services, minor construction, maintenance, repair, rehabilitation of real and personal property, * * * " etc., was recognized by Chairman Jake Garn of the Senate Appropriations Subcommittee on HUD and Independent Agencies. The Chairman made the following statement on the Senate floor during consideration of the fiscal year 1983 HUD and Independent Agencies Appropriations bill (H.R. 6956):

> Mr. President, in reference to this small business R&D issue. I intend, at a later point, to accept an amendment to strike the Senate proviso. In agreeing to this action, I would like to note that NASA is in a somewhat unique position for two reasons. First, much of the NASA appropriation is committed to programs begun in earlier years, including the Space Shuttle, which is operated as a national system for various users. *Further, a considerable portion of the appropriations account labeled "research and development" for NASA is actually for work that is not of a research and development nature.* For this reason, the bill language under the heading "research and development" refers to "operations, services, minor construction, maintenance, repair, rehabilitation and modification of real and personal property; tracking and data relay satellite services as authorized by law; purchase, hire, maintenance and operation of other than administrative aircraft, necessary for the conduct and support of aeronautical and space * * * activities." Although I realize that final implementation of rules and regulations are presently being developed by SBA, OMB and the effected agencies, including NASA, *it is my view that the provisions of Public Law 97-219 were intended to apply only the true research and development activities funded under this heading. (See Congressional Record,* September 24, 1982, S-1215.) [Italic supplied.]

The Senate proviso, later stricken, referred to in the quoted statement would have limited NASA's participation in the SBIR program to $1,570,000. Colloquy between Chairman Garn and the Senate sponsor of the Small Business Innovation Development Act, Senator Rudman, makes it clear that the $1,570,000 limitation was dropped because it was agreed that the Small Business Innovation Development Act itself provided the flexibility NASA needed to accommodate its operational needs while at the same time maintaining its commitment to the small business community. Thus, Sena-

tor Rudman made the following statements in support of deletion of the limitation:

Mr. RUDMAN. In studying the bill and the accompanying report, I see that the committee paid special attention to the application of Public Law 97-219, the Small Business Innovation Development Act, to the NASA program. I am pleased to see that the committee gave this program consideration and realize that NASA has voiced reservations concerning the possible effect of the program on its present R&D activities. However, as the original sponsor of the Small Business Innovation Development Act in the Senate, I believe that the concerns that are motivating the committee can be met without the necessity of providing a specific limitation to the Appropriations Act and propose an amendment to that effect.

* * * * * * *

However, to the extent that NASA has a problem unique unto itself for this upcoming fiscal year, I stand ready to work with the Senator from Utah and NASA to insure that there is no deleterious effect on the Agency's R&D activities caused by this first year of implementation of Public Law 97-219.

Senator Garn responded as follows:

Mr. GARN. I thank the gentleman. With that understanding, the concern of the Appropriations Committee is satisfied. Although the exact amount to be applied to Public Law 97-219 in fiscal year 1983 will depend on final appropriation figures, the explanation provided by the sponsor of Public Law 97-219 renders the committee amendment unnecessary, and I gladly accept the amendment.

As indicated, NASA's estimate of the amount of set-aside funds calculated on the basis of actual extramural R&D is $3.3 million, more than double the $1,570,000 which would have been allowed under the proposed appropriation act limitation.

In our view, an interpretation of the Small Business Innovation Development Act which would require application of the statutory set-aside percentage to the entire NASA R&D appropriation, without considering the actual nature of the items being funded by that appropriation, would be unduly strained. In the first place, NASA's appropriation, although captioned "Research and Development," by its terms clearly provides funds for functions in addition to R&D and, in fact, specifies the availability of funds for "operations."

Secondly, the Small Business Innovation Development Act does not speak in terms of "bottom line" amounts in agency R&D appropriations. The operative reference is each participating agency's R&D extramural budget. Moreover, Small Business Innovation Research programs are described in the Act as programs "under which a portion of a Federal Agency's extramural research or research and development *effort*" is set aside for small business. Thus, to determine an agency's R&D "effort," the Congress must look at its "extramural budget" for R&D, which in turn requires an analysis of the agency's budget submission. The nature of the work to be performed must conform to the Act's definition of R&D. It defines research and development in essentially the same way that that term is defined by the National Science Foundation and the Office of Management and Budget—by reference to the *nature* of the activities performed and the goals sought to be achieved through such activities. An automatic application of a statutorily

set percentage to a lump sum appropriation which, despite its label, includes amounts for non-R&D activities does not carry out the intent of the Act.

Finally, since funds set aside for an SBIR program may only be used for research and development, as defined by the Act, none of the funds set aside could be used for NASA's Space Shuttle program since the research and development phase of that program has been completed. However, the Shuttle program will account for roughly 60 percent of the funds to be spent by NASA from its appropriation under the R&D heading for fiscal year 1983. The statutory set-aside, however calculated, would therefore have to be applied to the extramural portion of the remaining 40 percent of NASA's total R&D appropriation. Calculation of the set-aside on the basis of the entire NASA R&D appropriation would thus result in a proportionately higher percentage than is permitted by the last proviso of section 4(f)(1) of the Act, quoted earlier. This anomalous result would clearly not seem to have been intended by the colloquy, mentioned above, between Senators Garn and Rudman, supporting deletion of a specific dollar limitation on NASA's participation in the SBIR program.

We therefore conclude that NASA's SBIR set-aside program should only be applied to those NASA programs funded through the NASA R&D appropriation and presented to the Congress as part of its detailed budget breakdown as constituting research and development as defined by the Small Business Innovation Development Act.

By regularly including its entire R&D appropriation as research and development in its annual response to the National Science Foundation's questionnaire and in information provided to OMB for inclusion in Special Analysis K, Research and Development, NASA has created a misleading impression of the total amount of funds actually available for true research and development and thus available for application to SBIR programs. We note that the portion of Special Analysis K of the President's budget for fiscal year 1984 which deals with NASA specifically excludes totals for operational activities. Moreover, the Office of Management and Budget, in its response to our request for comments on this case, suggests that in addition to the changed Special Analysis K treatment, NASA should change the title of its Research and Development appropriation to reflect its operational activities. We strongly endorse OMB's suggestion.

[B-206014]

General Accounting Office—Jurisdiction—Discrimination—Complaints Under Title VII—Civil Rights Act—Monetary Awards

In view of authority granted to EEOC under Title VII of the Civil Rights Act of 1964, as amended, General Accounting Office (GAO) does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, GAO may determine the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII.

Civil Rights Act—Title VII—Discrimination Complaints—Informal Agency Settlement—Without Discrimination Finding—Backpay

Agencies have the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination under EEOC regulations and case law. Title VII of the Civil Rights Act of 1964, as amended, and EEOC regulations issued thereunder provide authority for agencies to award backpay to employees in discrimination cases, independent of the Back Pay Act, 5 U.S.C. 5596. Thus, backpay is authorized under Title VII without a finding of an "unjustified or unwarranted personnel action" and without a corresponding personnel action.

Civil Rights Act—Title VII—Discrimination Complaints—Informal Agency Settlement—Without Discrimination Finding—Cash Award Limitations

Informal settlements without a specific finding of discrimination are authorized by Title VII of the Civil Rights Act of 1964, as amended. In such informal settlements Federal agencies may authorize backpay awards, attorney fees, or costs without a corresponding personnel action. However, agencies are not authorized to make awards not related to backpay or make awards that exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made. An award may not provide for compensatory or punitive damages as they are not permitted under Title VII.

Equal Employment Opportunity—Commission—Authority—Title VII Discrimination Complaints—Informal Agency Settlement—Remedial Actions

The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision.

Matter of: Equal Employment Opportunity Commission—Informal Settlements of Discrimination Complaints—Monetary Awards, March 7, 1983:

We have consolidated four cases,[1] and will consider them jointly in this decision since they present related questions on the appropriateness of certain awards pro-

[1]The four cases are B-206014—Small Business Administration; B-203194—Department of the Interior; B-202552—Department of the Army; and B-202521—Department of the Navy.

posed in informal settlements of Federal employee discrimination complaints processed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (Supp. IV 1980). The cases discussed below essentially present the questions of whether an agency has the authority to informally settle a discrimination case: (1) by awarding backpay without effectuating a corresponding personnel action such as a retroactive promotion or reinstatement; (2) by awarding a monetary sum not based on backpay; or (3) by paying backpay without deductions or backpay computed without reference to the backpay regulations, 5 C.F.R. Part 550, Subpart H (1982).

FACTUAL BACKGROUND

In B-206014, a former employee of the Small Business Administration (SBA) who had been removed from his position filed a complaint of discrimination against the agency, contesting his removal. In order to resolve the complaint the SBA agreed to an informal settlement without rehiring the employee and without a specific finding of discrimination. As part of that settlement the SBA agreed to pay the sum of approximately $30,000. The amount represents the employee's gross salary for a part of the period of removal, including all pay and within-grade increases due, as well as a lump-sum payment for accrued annual leave. The certifying officer forwarded the case to this Office requesting a decision as to whether the settlement award may be paid, and, if so, what deductions, such as interim earnings, if any, must be made from this award.

In B-203194, an employee of the Department of the Interior had been temporarily promoted to a GS-13 position for a period of 120 days, and then returned to her GS-12 position. However, the employee continued to perform the duties of the GS-13 position for an additional 5 months. This additional 5-month period, together with all her previously recognized temporary promotions to the GS-13 level, allegedly gave the employee over 1 year's experience at the GS-13 level. The employee filed a discrimination complaint against the Department of the Interior after she was determined to be ineligible for a promotion to a GS-14 position because she did not meet the time-in-grade requirements. As part of the informal settlement reached without a specific finding of discrimination, the Department of the Interior agreed that the employee would receive backpay at the GS-13 level for a period of 5 months and the employee's records would be corrected to show she had satisfied the time-in-grade requirement for a GS-14 level position. In addition, the employee would receive backpay for the difference between the salary she received at the GS-12 level and that of the GS-14 level for an additional 4 months. The case was forwarded to this Office on the question of whether the proposed award under the settlement agreement is authorized in view of our decision in *Donald L. Bressler,* 58 Comp. Gen. 401 (1979), which relates to overlong details to higher graded positions.

In B-202552, an employee filed a discrimination complaint against the Department of the Army based upon his nonselection

for GS-11 position. As part of an informal settlement reached without a specific finding of discrimination, the agency agreed to pay the employee the sum of $3,000. The settlement agreement specifically stated, "[t]he aforementioned monetary adjustment is not and shall not be construed or interpreted as an award of back pay, attorney's fees, or damages of any other type." The case was forwarded to this Office for a decision on the propriety of the award.

In B-202521, a GS-7 employee filed a discrimination complaint against the Department of the Navy based upon her nonselection for a GS-9 position. As part of an informal settlement reached without a finding of discrimination, the employee was reassigned to a GS-7, target GS-9 position. Although the employee was not given a retroactive promotion, the agency agreed to pay the employee backpay at the GS-9 position from the date of her nonselection to the date of settlement. The case was forwarded to this Office for a decision on the question of whether an employee may receive backpay at the GS-9 level where a retroactive promotion to GS-9 was not a part of the settlement agreement.

All of the above proposed settlements were negotiated under the authority of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (Supp. IV 1980), and corresponding regulations promulgated by the Equal Employment Opportunity Commission (EEOC). See 29 CFR §§ 1613.217 and 1613.221.

LAW AND REGULATIONS

Title VII of the Civil Rights Act of 1964, as amended, was made applicable to Federal employees in 1972, and the governing statutory provision as amended is found in 42 U.S.C. § 2000e-16 (Supp. IV 1980), which provides:

> (a) * * * All personnel actions affecting employees or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.
>
> (b) * * * Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. * * *

EEOC's regulations promulgated under authority of Title VII and published in Title 29 of the Code of Federal Regulations, provide as follows:

> § 1613.217 Adjustment of complaint and offer of hearing.
>
> (a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. * * *
>
> If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief. * * *
>
> * * * * * * *
>
> § 1613.221 Decision by head of agency or designee.

(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

* * * * * * *

(c) the decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. * * *

DISCUSSION

In view of the authority granted to EEOC by the statute, GAO does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. See *Clem H. Gifford,* B-193834, June 13, 1979. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, we have issued several decisions on the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII. See, for example, B-199291, June 19, 1981 (agencies have the authority to award attorney fees to prevailing complainants at the administrative level, such awards to be made from the agency's operating expense as a necessary and proper expense); *Gene A. Albarado,* 58 Comp. Gen. 5 (1978) (agency has no authority to allow interest in settlement of an EEO complaint under Title VII); and 54 Comp. Gen. 622 (1975) (applicable retirement deductions should be made against gross salary entitlement, even though amount payable is reduced by interim earnings, in remedial action for employment discrimination).

To place the present cases in the proper perspective, it is beyond question that an agency has the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination. These issues have been affirmatively resolved by EEO regulations and are no longer questioned by this Office. See 29 C.F.R. § 1613.221(c) and *Shaw* v. *Library of Congress,* 479 F. Supp. 945 (D. D.C. 1979). It is clear that Title VII itself provides authority for awarding backpay to employees in a discrimination case, independent of the Back Pay Act of 1966, 5 U.S.C. § 5596, and its requirements of a finding of an "unjustified or unwarranted personnel action." The connection between Title VII and the Back Pay Act arises only because EEOC has provided in its regulations on remedial actions that when discrimination is found, an award of backpay under Title VII is to be computed in the manner as under the Back Pay Act regulations. See 29 C.F.R. § 1613.271.

In view of EEOC's authority in this area, we requested its comments on these cases. The EEOC states that section 717 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-16),

together with its legislative history, EEOC's regulations, and the current case law, provide sufficient authority for informal adjustments of discrimination complaints in the Federal sector to contain monetary payments which are independent of any personnel action. In its comments to this Office, EEOC states that Title VII's legislative history:

> * * * is unequivocal in stressing that conciliation and voluntary settlement are the keystones of the eradication of employment discrimination, both in the public and private sectors, and that the broadest of latitude exists in determining the appropriate remedy for achieving this end.

In EEOC's view the legislative history supports the conclusion that the term "appropriate remedies" is to be broadly construed. For example, the legislative history of section 717 of Title VII, states that:

> Thus the provision in section 717(b) for applying "appropriate remedies" is intended to strengthen the enforcement powers of the Civil Service Commission by *providing statutory authority and support for ordering whatever remedies or actions by Federal agencies are needed to ensure equal employment opportunity in Federal employment.* Remedies may be applied as a result of individual allegations of discrimination, CSC investigation of equal employment opportunity programs in Federal agencies or their field installations, or from review of agency plans of action and progress reports. Remedies may be in terms of action required to correct a situation regarding a single employee or group of employees or broader management action to correct systemic discrimination and to improve equal employment opportunity program effectiveness to bring about needed progress. The Commission is to provide Federal agencies with necessary guidance and authority to effectuate necessary remedies in individual cases, including the award of back pay, reinstatement or hiring, and immediate promotion where appropriate. [Italic supplied.] S. Rep. No. 92-415, 92nd Cong., 1st Sess. 15 (1971).

As further support EEOC cites the case of *Shaw* v. *Library of Congress,* 479 F. Supp. 945 (D. D.C. 1979), which held that Title VII provided the Library of Congress with authority to award a retroactive promotion and backpay in settlement of a discrimination case without a specific finding of discrimination. In that case, the District Court of the District of Columbia stated:

> The authorities are legion that Congress and the courts intended employers, private and public (including the Library), to have and to exercise broad authority to remedy employment discrimination. * * * Devices to achieve these objectives are freely available in court, at the administrative level and as management techniques of employers. 479 F. Supp. at 948-49. (Citations omitted.)

Additionally, in its letter to us, EEOC notes that:

> It has long been the practice in the private sector for companies to enter into settlements which contain cash payments where there has been neither a finding of discrimination, either judicially or administratively, nor an admission by the employer of any wrongdoing.

Thus, EEOC concludes that the specific remedial action proposed in one of the pending cases, B-202521—payment to employee of a sum equal to the backpay at a GS-9 position from the date of nonselection to date of the settlement agreement even though the employee is not to receive a retroactive promotion to the position—is not only proper but to be encouraged.

The EEOC, while concluding that informal settlements may contain monetary payments which are independent of any personnel action, defines the limits of those monetary payments as follows:

> Section 1613.217 permits informal settlement agreements to include back pay, attorney's fees or costs as monetary amounts. Courts have given the term "back pay" a very broad interpretation covering many benefits of employment, in addition to salary, that form part of the employee's compensation, including overtime, sick pay, and shift differentials. These cash awards do not constitute damages of any kind, but are economic restitution necessary to restore employees to the economic position they would have but for the alleged discrimination. * * * Thus agencies can agree to pay back pay, reasonable attorney's fees and costs. Compensatory or punitive damages, or back pay amount in excess of a complete back pay award, would not be permissible. (Footnotes omitted.)

Under EEOC's view, agencies are authorized to informally settle a Title VII complaint without a specific finding of discrimination, and to make monetary awards for backpay, attorney's fees, or costs whether or not the employee is actually promoted or reinstated. The limit of any monetary award is the amount of backpay, attorney's fees, or costs that the employee would have been entitled to if discrimination has been actually found.

We recognize that public policy favors the amicable settlement of disputes, and agreements accomplishing this result will be disregarded only for the strongest of reasons. *Cities Service Oil Co.* v. *Coleman Oil Co., Inc.,* 470 F.2d 925 (1st Cir. 1972); *Lichtenstein* v. *Lichtenstein,* 454 F.2d 69 (3rd Cir. 1972). It is clear that this policy in favor of informal settlement of disputes applies to Title VII cases, in both the private and public sectors. See *Sears Roebuck and Company* v. *EEOC,* 581 F.2d 941 (D.C. Cir. 1978) and *Shaw* v. *Library of Congress,* 479 F. Supp. 945 (D. D.C. 1979).

In *Shaw* v. *Library of Congress,* the court said:

> "* * * In light of the historic policy favoring the amicable settlement of disputes and the particular settlement policy of Title VII, no regulation should be interpreted as intending to limit the bargaining options available to an agency confronted by a bona fide discrimination complaint unless the language of the regulation is specific and unambiguous. * * *" 479 F. Supp. at 949.

Although the EEOC regulations do not explicitly provide for settlements of the types proposed here, we cannot say that the interpretation given Title VII and these regulations by the EEOC is improper, and we are hereby adopting that interpretation. We believe that, in light of the authorities cited above, it is the appropriate interpretation.

Thus, we conclude that Federal agencies have the authority in informally settling discrimination complaints filed under Title VII of the Civil Rights Act of 1964, as amended, to make awards of backpay, attorney's fees or costs, without a corresponding personnel action and without a finding of discrimination, provided that the amount of the award agreed upon must be related to backpay and may not exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made. The award may not provide for compensatory or punitive damages as

they are not permitted under Title VII. *DeGrace* v. *Rumsfield,* 614 F.2d 796 (1st Cir. 1980).

Generally, the maximum amount that would be recoverable under Title VII if a finding of discrimination is made, and the maximum amount that could be awarded under an informal settlement, is the gross amount of backpay the employee lost minus any interim earnings and other deductions listed in 5 C.F.R. § 550.806(e). For example, in B–206014, the SBA agreed to pay a monetary sum which represented the employee's gross salary for a part of the period of his contested removal. If the amount agreed upon is less than the maximum amount that would be recoverable under Title VII, if a finding of discrimination had been made, and his recovery calculated under the Back Pay Act regulations, it may be paid. The sums agreed upon in B–203194 and B–202552, which apparently represent backpay for allegedly lost promotional opportunities may likewise be paid if they represent an award which does not exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination had been made.

However, we have insufficient information concerning the payment of $3,000 in B–202552. If it is a lump-sum payment unrelated to backpay or is in the nature of compensatory or punitive damages, the payment would not be proper. On the other hand, even though it is stated not to be backpay, if it was arrived at on a basis consistent with backpay as discussed in this decision, then payment may be made.

We are concerned that EEOC's present regulations on remedial actions in informal settlements without a specific finding of discrimination do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII. We recommend that EEOC review and revise its present regulations to provide such guidance. Until such time, however, agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision.

Accordingly, the settlements reached in these four cases may be implemented in accordance with the foregoing under the authority of Title VII and the corresponding EEOC regulations.

[B–207627]

Strategic and Critical Materials—Barter Exchange—Excess Stockpile Materials—Authority of GSA—Sales as Contractor's Agent—Congressional Oversight

Proposal by General Services Administration (GSA) to sell, on behalf of contractor, excess Stockpile materials under the Strategic and Critical Stock Piling Act, 50 U.S.C. 98e(c), where title has been transferred to the contractors in exchange for other neeeded Stockpile materials, is legally within the parameters of GSA's existing barter authority. Where a statute confers duties in general terms, all powers and duties incidental and necessary to make such authority effective are included by implication. Congress has encouraged barter transactions and the proposed plan

helps accomplish the purposes of the Act. However, since it may have a significant effect on congressional control over the Stockpile transaction, GSA should discuss the proposal with its congressional oversight and appropriations committees before implementation.

Strategic and Critical Materials—Barter Exchange—Excess Stockpile Materials—National Defense Stockpile Fund—Crediting Non-Necessity—Government Sales in Agency Capacity

Where United States is acting as agent in sale of excess Stockpile materials on behalf of contractors to whom title of materials has been transferred, GSA may pay proceeds from the sale directly to the contractor rather than deposit it to the credit of the National Defense Stockpile Fund, 50 U.S.C. 98h, since the proceeds are for the benefit of the contractor rather than the United States.

Matter of: GSA—Acquisition of Strategic and Critical Materials by Barter Exchange Under 50 U.S.C. 98e(c), March 7, 1983:

This decision is in response to a submission from the General Counsel of the General Services Administration (GSA) asking:

(1) Whether it may sell, on behalf of contractors, excess Stockpile materials in the custody of the Government but for which title has been transferred to the contractors in exchange for other needed Stockpile materials; and,

(2) Whether it may pay the proceeds of the sale directly to the contractor rather than deposit it to the credit of the National Defense Stockpile Fund.

For the reasons stated below, we answer both of these questions in the affirmative. However, while we find that these proposals are legally within the parameters of GSA's existing authorities, they represent a new use of these authorities which may have a significant effect on the extent of congressional control over Stockpile transactions. We therefore recommend that GSA's new approach be discussed with its congressional oversight committees and appropriations committees before it attempts to implement it.

These questions arose in connection with a proposed agreement for the acquisition of 1.2 million long dry tons of bauxite by the Government of the United States (represented by the GSA) from the Government of Jamaica. Under the proposed agreement, part ($18.84 million) of the total purchase price ($50.688 million) will be paid by using the barter authority set forth in section 6 of the Strategic and Critical Materials Stock Piling Act (Act),[1] as amended, 50 U.S.C. § 98e(c).

Although GSA was authorized to use excess Stockpile materials in payment for needed Stockpile material prior to 1979 by language contained in the annual "Operating Expenses" appropriations for

[1] The National Defense Stockpile (Stockpile) was created in 1979 (when the Act was totally rewritten) by section 3 of the Act, as amended. 50 U.S.C. § 98b transferred materials maintained by the Government under a number of other provisions of law to the Stockpile. Management and operational control of the Stockpile were vested in the President who delegated this authority to the Administrator of General Services. Executive Order No. 12,155, 3 C.F.R. 426 (1979).

the Federal Supply Service (see, for example, the Treasury, Postal Service, and General Government Appropriations Act, 1979, October 10, 1978, 92 Stat. 1010), and was also authorized by various provisions of law to barter other surplus Government property for various Stockpile materials, GSA apparently made only limited use of these authorities. However, now that GSA is embarking on a new program to restructure the Stockpile, it is exploring a wider use of this authority to acquire a substantial portion of needed materials.

GSA has indicated that its planning under 50 U.S.C. § 98e(c) originally focused on a commodity-for-commodity exchange and contemplated that solicitations for needed commodities would state that payment would be made with excess materials, and included a list of these materials. Offerors would use a dollar figure to establish the price of the needed commodity; however, the successful offeror would not be paid in cash, but rather in excess materials of equivalent value to the dollar amount of the offer. However, GSA identified a number of problems with this approach which lessened its appeal and caused it to seek alternatives to this approach.

GSA described these problems as follows:

1. *Valuation of excess materials.* The materials which are excess to stockpile requirements frequently do not have an established market price. For example, certain commodities in the stockpile vary substantially from current industry specifications; others may have deteriorated due to long-term storage. Without a reliable price standard, it is difficult to determine the value of the excess materials relative to the value of the needed commodities.

2. *Fluctuation in the price of exchange materials.* Even when the value of the exchange materials can readily be determined by published market prices or commodity exchange prices, rapidly changing market conditions can make exchange materials an unattractive form of payment. The markets for excess materials may be volatile. Within an eight-month period, tin, an excess material which comprises a substantial portion of GSA's stockpile disposals, climbed from a price of about $6.00 per pound to a price of $7.45, then fell back to the $6.00 range. Faced with such drastic market fluctuations, combined with long delivery periods for the excess materials, potential suppliers are likely to raise their prices for the needed commodities to cover market contingencies.

3. *Use of commodity brokers.* The firms supplying the Government with stockpile materials frequently have no need for the materials which would be offered in exchange. In these cases, interested firms may have to employ a commodity broker to dispose of the payment commodity. Brokerage fees could range from 2 percent up to 7 percent of the market price of the exchange material. These expenses may result in increased prices to the Government for the commodity being acquired.

4. *Potential for market disruption.* Section 6(b) of the Stock Piling Act provides: * * * To maximum extent feasible—

* * * * * * *

(2) Efforts shall be made in the acquisition and disposal of such materials to avoid undue disruption of the usual markets of producers, processors, and consumers of such materials and to protect the United States against avoidable loss * * *

* * * * * * *

To avoid market disruption in the disposal of excess stockpile materials, GSA closely monitors commodity markets to determine the proper quantities of materials to be sold and to establish the proper schedule for the sales. Once excess materials are designated for exchange and a delivery schedule is established, GSA could lose the control over the exchange commodities in the market. This problem could be exacerbated if the contractor did not use the material, but rather hired a commodity broker to dispose of it. Given a substantial amount of excess material, a broker possibly would have the opportunity to influence the market for that material.

Consequently, rather than use of a direct commodity-for-commodity exchange, GSA has proposed that the following method be employed under the proposed agreement with Jamaica.

After receipt and acceptance of a shipment of needed Stockpile material by the Government, GSA would designate as an exchange material one of its excess commodities which is available for sale. The value of the designated material would be calculated on the basis of the highest acceptable bid received. Title to an amount of exchange material equal in value to the quantity of needed material accepted by GSA would be transferred to the contractor. However, the contractor would never take physical possession of the payment material. Instead, GSA would sell the material on behalf of the contractor, with the contractor signing the sales documents. The purchaser would make payment directly to the contractor. Upon notification by the contractor that payment had been received, GSA would release the material for shipment to the purchaser.

GSA believes that under this alternative, the problems identified with direct commodity-for-commodity exchange would be lessened. The value of the exchange materials would be determined by the amounts of the bids received, and, according to GSA, this is a more accurate indicator of value than a negotiated price or a market index. The risk of drastic market fluctuations which can have an effect on commodity-for-commodity exchanges would be removed. Under the exchange transactions proposed by GSA, it would not be bound either to deliver a specific commodity for exchange or to a predetermined delivery date. If market conditions require that sales of one commodity be suspended or curtailed to avoid market disruptions, GSA could designate for exchange any other excess material which is available for sale in the GSA disposal program.

GSA SALE ON BEHALF OF CONTRACTORS

The barter provision as set forth in 50 U.S.C. § 98e(c) provides:

(c)(1) The President shall encourage the use of barter in the acquisition of strategic and critical materials for, and the disposal of materials from, the stockpile *when acquisition or disposal by barter is authorized by law and is practical and in the best interest of the United States.*

(2) *Materials in the stockpile, the disposition of which is authorized by law, shall be available for transfer at fair market value as payment for expenses* (including transportation and other incidental expenses) *of acquisition of materials,* or of refining, processing, or rotating materials, under this subchapter.

(3) To the extent otherwise authorized by law, property owned by the United States may be bartered for materials needed for the stockpile. [Italic supplied.]

While nothing in this subsection specifically authorizes disposal in the manner proposed, nothing in this subsection or any other provision of the Act specifically precludes it. While a commodity-for-commodity exchange between the Government and a supplier of a needed Stockpile material may be the most obvious method of "barter" or "transfer" to pay for an acquired material, it does not

mean that this is the only method authorized by the provision. We note that as a general rule of statutory construction, where a statute confers duties in general terms, all powers and duties incidental and necessary to make such authority effective are included by implication. See *United States* v. *Bailey,* 34 U.S. 238 (1835); *Daly* v. *Stratton,* 326 F.2d 340 (7th Cir. 1964); *United States* v. *State of Louisiana,* 265 F. Supp. 703 (E.D. La. 1966), *aff'd* 386 U.S. 270 (1967); *Sutherland Statutory Construction, 4th ed.,* §§ 55.02, 55.04. Additionally, we have previously approved liberal application of an agency's barter authority when necessary to accomplish legislative purposes. *See* 52 Comp. Gen. 436 (1973).

In providing permanent barter authority to the President for use in acquiring Stockpile materials, the Congress intended to encourage both its use for acquiring needed materials and to reduce the need for resort to the Treasury for funds for this purpose. *See* H.R. Rep. No. 96-46 accompanying H.R. 2154 (the bill which became the 1979 revision to the Act) p. 6 (1979). By encouraging the use of barter for the acquisition of needed goods, it helped to assure accomplishment of the Act's overall purpose, that is, reduction of the dangerous and costly dependence of the United States upon foreign sources of supplies of strategic and critical materials in times of national emergency. 50 U.S.C. § 98a(b). Thus, to the extent the proposed plan facilitates the use of excess Stockpile materials to pay for the acquisition of needed materials, it helps accomplish the purposes of the Act and helps reduce the need for resort to the Treasury for payment.

Furthermore, Congress has been made aware of the need to adjust barter transactions to the realities of the worldwide laws of supply and demand and that direct commodity-for-commodity exchanges between the Government and a national supplier were not the only transactions undertaken under previously existing barter authority. For example, during hearings held on H.R. 4895, 95th Congress,[2] before the House Armed Services Committee, the Department of Agriculture provided testimony describing the operation of barter programs for the acquisition of Stockpile materials, as follows:

HOW BARTER CONTRACTS WORKED

From its inception, barter activities were accomplished under contracts signed by CCC and private U.S. firms. Based on stockpile needs, invitations were issued to U.S. companies to submit offers to deliver strategic materials and export agricultural commodities. These offers were reviewed by specialists in GSA (the custodian of Government stockpiles) and other Government agencies with respect to the offered price of the material, specifications and related matters. Usually, there was considerable negotiation between CCC and an offeror before a contract was signed.

[2] H.R. 4895, 95th Congress, was the predecessor of H.R. 2154, 96th Congress, which totally revised the Strategic and Critical Stock Piling Act. H.R. 4895 passed the House and many of its provisions, including barter authority, were incorporated in H.R. 2154. See *Hearings on H.R. 2154 before the Seapower and Strategic and Critical Materials Subcommittee of the House Armed Services Committee, 96th Cong.,* 1st Sess., p. 1 (1979).

Materials were delivered by contractors to U.S. ports and transported by GSA to stockpile locations. Contractors received agricultural commodities from CCC inventories and shipped them abroad in accordance with their contracts. Most contracts ran from 1 to 3 years and were valued at between $1 and $5 million.

TYPES OF CONTRACTS

Bilateral.—The first barter transactions required the sale of the agricultural commodities to the country which furnished the strategic materials. It soon became apparent that many of the countries furnishing materials were unable to absorb an equivalent value of wheat, corn, or other commodities. Therefore, a second type of barter contract was developed—the multilateral.

Multilateral.—Under this kind of contract, material would originate in one country and counterpart agricultural commodities would be sold to one or more different countries. Contractors were obligated to move an equivalent value of needed materials, goods or equipment produced in the recipient countries to the country supplying the strategic materials. Multilateral contracts were difficult to negotiate and complex to administer. Ultimately, they gave way to a third type of contract—open-end.

Open-end.—These contracts permitted the delivery of materials from one country and the export of commodities to one or more different countries—countries which were not good U.S. commercial markets for the commodity. This proved to be the easiest method to negotiate and administer and eventually replaced the other two methods.[3]

In further elaboration of the problems encountered in operating barter programs, Francis A. Woodling, Deputy Assistant Sales Manager, Commercial Export Programs, Department of Agriculture, testified:

Since I am here representing the Department of Agriculture, permit me to mention a few of the problems we encountered in working out barters or exchanges of our agricultural surpluses for strategic materials. Very quickly, we discovered that those countries which had strategic materials were sometimes those least interested in exchanging them for U.S. grains.

Take the last strategic materials barter contract we entered into, the one for rutile originating in Australia. Australia is one of the world's larger grain producers. It was not interested in accepting U.S. wheat for its rutile. Or consider those less developed countries which had strategic materials of considerable value but had neither the desire nor the capacity to absorb agricultural commodities in the vast quantities which would represent the value of the industrial diamonds or the quality managanese [sic] ore they were able to deliver to us.

These kinds of situations led us to adopt mechanisms which tended to distort the popular concept of a barter. Most people think of barter as a swap, a pair of my shoes for a pair of your gloves. But if you don't want my shoes, but I want your gloves then I offer you a choice. You give me your gloves and I will let you have either three pairs of my socks or two of my neckties or one of my dress shirts, as you select.

Thus, we began to write contracts which called for delivery to CCC of iodine in exchange for wheat, feedgrains, cotton, tobacco, soybeans, or butter from CCC inventories, either one or more up to the value of the iodine.

Of course, this worked fairly well for mineral rich countries which had a real need for one or another of the agricultural products CCC had to offer. However, it did not take care of the country with chrome ore and no pressing need for our wheat, cotton, or tobacco. For such cases, we further modified barter contracts so that the farm products with which we paid for strategic materials could be exported and sold in named foreign countries in addition to those countries which supplied the minerals and metals.[4]

The Congress was thus aware of the need to broadly construe existing barter authority in order to carry out commodity exchanges

[3] *Hearings on H.R. 4895, before the Seapower and Strategic and Critical Materials Subcommittee of the House Armed Services Committee, 95th Cong., 1st Sess.*, pp. 20–21 (1977).
[4] *Id.* 25.

to acquire needed critical and strategic materials, and it expressed no objection to the practice nor did it attempt to legislatively curtail it. Instead, the barter authority was made permanent and the President was encouraged to use it in acquiring needed Stockpile materials.

DISPOSITION OF PROCEEDS FROM SALE

Section 9 of the Act, as amended, 50 U.S.C. § 98h, provides:

(a) There is established in the Treasury of the United States a separate fund to be known as the National Defense Stockpile Transaction Fund (hereinafter in this section referred to as the "fund").

Fund operations

(b)(1) All moneys received from the sale of materials in the stockpile under paragraphs (5) and (6) of section 98e(a) of this title shall be covered into the fund. Such moneys shall remain in the fund until appropriated.

(2) Moneys covered into the fund under paragraph (1) shall be available, when appropriated therefor, only for the acquisition of strategic and critical materials under section 98e(a)(1) of this title (and for transportation related to such acquisition).

(3) Moneys in the fund, when appropriated, shall remain available until expended, unless otherwise provided in appropriation Acts.

Moneys received from sale of materials being rotated or disposed of

(c) All moneys received from the sale of materials being rotated under the provisions of section 98e(a)(4) of this title or disposed of under section 98f(a) of this title shall be covered into the fund and shall be available only for the acquisition of replacement materials.

Thus under subsection (b), the proceeds from certain disposals are required to be deposited to the credit of the Stockpile Fund rather than to the credit of miscellaneous receipts in the Treasury, as otherwise would have been the case. Once in the Stockpile fund, they are available only for appropriation for acquisition of Stockpile materials. Once appropriated they remain available until expended.

Subsection (c) establishes a permanent indefinite appropriation of receipts from rotation transactions or special disposals, to be used for acquiring replacement materials for the Stockpile. B-197118, January 14, 1980. Under both subsections, it was contemplated that the receipts deposited would be those received from the sale of Stockpile materials, that is, materials owned by the Government. However, under GSA's proposal the receipts will not be received from the sale of Government-owned material since title to the materials will have been transferred to the Government of Jamaica before the sales are made. Thus any proceeds received by the GSA as a result of the sale of excess strategic and critical material to which title has been transferred to Jamaica would be on behalf of, or as agent of, the Government of Jamaica and not for the benefit of the United States. In circumstances such as these, the Government could not retain the proceeds. See *United States* v. *Sinnot*

and others, 26 F. 84 at 86 (C.C. Oregon, 1886); 60 Comp. Gen. 15, 26 (1980) and cases cited therein; B-205901, May 19, 1982.

AREAS OF CONCERN

Notwithstanding the foregoing, this authority is not totally without limits, and is should not be used to circumvent other valid limitations or controls upon GSA's Stockpile activities.

It is clear that but for the transfer of title to the excess strategic and critical materials to Jamaica, GSA would be required to deposit the proceeds from any sale of excess critical or strategic materials to the credit of the Fund. Once deposited to the credit of the Fund, they could not then be expended (except in certain specified situations unimportant to our discussion here) without further appropriation by the Congress. Thus the proposed transaction serves to lessen the Congress' ability to control Stockpile acquisitions through the appropriations process.

However, the adverse effect that the proposed agreement might have on congressional authority is mitigated somewhat by the fact that under section 5(b) of the Act, as amended, 50 U.S.C. § 98d(b), congressional approval is required before any material may be disposed of (except in certain situations expressly provided for by the Act) by any means, including barter. Also, section 11(a)(2) of the Act, as amended, 50 U.S.C. § 98h-2(a)(2), requires the President to submit to the Congress every 6 months a written report providing information with respect to the acquisition and disposal of materials by barter during that 6-month period. Finally, any revisions upward or downward in the amounts of material to be stockpiled must be reported to the Armed Services Committees of the House and Senate 30 days before they may become effective. See section 3 of the Act, as amended, 50 U.S.C. § 98b. Thus the Congress will be afforded notice of any increases necessitating further acquisitions or decreases necessitating disposals.

On balance, this Office sees no reason to object to the GSA's Stockpile proposals. As indicated earlier, the Act's exchange authority does not literally require a commodity-for-commodity exchange and the requirement to deposit proceeds of the sale of excess commodities in the Fund is not applicable when title to the excess commodities is transferred prior to the time that the sale takes place. Although congressional oversight may still be exercised because of the necessity to secure advance congressional approval of planned disposals, and as a result of the reporting requirements, discussed above, the proposed agreement with Jamaica represents a significant departure form existing Stockpile acquisition practices. We therefore recommend that GSA obtain the views of the appropriate committees of the Congress before attempting to implement the new procedures.

There are a few other areas of concern to this Office under the proposed method of exchange which also should be addressed prior to entering into the agreement with Jamaica.

The proposed agreement fails to specify which country assumes the risk of loss for damage or loss of materials. For example, who assumes the risk of loss if the exchange material is lost or destroyed after the transfer of title, but prior to sale on behalf of Jamaica—in other words, while still in the custody of the Government. If the Government is held liable, where will the funds to pay Jamaica come from? Furthermore, how will situations be handled where the United States accepts bauxite and transfers title of a commodity to Jamaica but cannot sell the designated exchange material and no other surplus critical material is available for transfer. GSA should ascertain whether these or any other potential occurrences could require a monetary payment in Jamaica and satisfy itself that a source of funds would be available should they occur. Alternatively, ways of limiting the Government's liability should also be explored.

With these caveats, we have no objection to the proposed new procedures for obtaining Stockpile materials.

[B-205709]

Leaves of Absence—Annual—Restored—"Buying Back"—After Workers' Compensation Award—Forfeiture After Leave Adjustment

Employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from work-related illness accepted workers' compensation and bought back leave used. Upon reconstruction of the employee's leave record to show the recredit of the leave as of the time it was used, regular annual leave reinstated in excess of the maximum carry-over stated in 5 U.S.C. 6304(a) is subject to forfeiture and may not be restored under 5 U.S.C. 6304(d). Previously restored leave recredited to leave year 1978 was subject to forfeiture at the end of leave year 1979 and therefore is not eligible for further restoration.

Leaves of Absence—Annual—"Buying Back"—After Workers' Compensation Award—Forfeiture After Leave Adjustment—Administrative Error Effect

Employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from work-related illness accepted workers' compensation and bought back leave used. Upon reconstruction of the employee's leave records to show recredit of the leave as of the time it was used, 66 hours of repurchased restored and regular annual leave were subject to forfeiture. Since the employing agency failed to apprise the employee of the possibility of forfeiture, the employee at his election may choose to be placed on annual leave for 1978 to avoid any or all of the forfeiture.

Matter of: Edmond Godfrey—"Buy Back" of Annual Leave—Workers' Compensation, March 16, 1983:

Alfred M. Zuck, Assistant Secretary for Administration and Management, U.S. Department of Labor, requests a decision as to

whether Edmond Godfrey may have restored to his leave account 10 hours of regular annual leave and 56 hours of restored annual leave which he bought back upon his acceptance of compensation under the Federal Employee's Compensation Act, 5 U.S.C. §§ 8101–51 (1976). We hold that regular annual leave reinstated as the result of buy-back and subject to forfeiture under 5 U.S.C. § 6304(a) (Supp. III 1979) may not be restored under 5 U.S.C. § 6304(d) (1976), and that restored leave recredited to a prior leave year and subject to forfeiture under 5 C.F.R. § 630.306 (1982) is not eligible for further restoration. However, since the employing agency failed to advise the employee that a portion of the repurchased leave would be subject to forfeiture, the employee at his election may choose to be placed on annual leave retroactively to avoid any or all of the forfeiture. He would then be entitled to a refund of the amount paid for that leave from his employing agency and would be required to refund any workers' compensation received for that period to the Office of Workers' Compensation Programs, Department of Labor.

The relevant circumstances insofar as can be determined from the record and supplementary information furnished by the Department of Labor are as follows. During the period February 13 to October 10, 1978, a work-related illness caused Mr. Godfrey to use 888 hours of sick leave and 392 hours of annual leave, including 56 hours of annual leave which had been forfeited in 1977 due to exigencies of public business and restored under the provisions of 5 U.S.C. § 6304(d)(1). After the Department of Labor's Office of Workers' Compensation Programs approved his workers' compensation claim, Mr. Godfrey submitted to the agency an application dated September 22, 1980, requesting buy-back and reinstatement of the leave under the workers' compensation provisions of 20 C.F.R. § 10.310 (1982). The Department of Labor processed Mr. Godfrey's application during the latter part of 1980 and implemented the repurchase in early 1981.

Because of Mr. Godfrey's buy back of leave, the Department of Labor reconstructed his accounts to recredit the leave as of the time it was used. The agency found that repurchase of the regular annual leave caused Mr. Godfrey's leave balance for 1978 to exceed by 10 hours the 240-hour annual leave ceiling imposed by 5 U.S.C. § 6304(a). Additionally, the agency determined that the 56 hours of restored leave recredited to leave year 1978 were subject to forefeiture based on provisions in 5 C.F.R. § 63.306 (1981), which impose a 2-year limitation on the use of such leave.

Mr. Godfrey contends that extended illness prevented him from scheduling and using the regular and restored annual leave recredited to leave year 1978 and, therefore, the leave may be reinstated to his account under the provisions of 5 U.S.C. § 6304(d)(1), as interpreted in our decisions. *Robert W. Lochridge*, B–193431, August 8, 1979, and *Robert T Good*, B–182608, February 19, 1976. In those de-

cisions, we held that an employee who has suffered a prolonged illness preceding the end of a leave year may be presumed to have scheduled annual leave otherwise subject to forefeiture. Additionally, Mr. Godfrey states that he would not have exercised his option to buy back the leave had he been advised of the possibility that repurchased leave would be forfeited.

We have held that under the forfeiture provisions of 5 U.S.C. § 6304(a), an employee who buys back annual leave following a workers' compensation award must have his annual leave record reconstructed to show the recredit of the leave as of the time it was used and that in such a reconstruction, annual leave reinstated in excess of the maximum permissible carry-over would be forfeited. See *Helen Wakus*, B-184008, March 7, 1977. Although Mr. Godfrey contends that under 5 U.S.C. § 6304(d) forfeiture of the 10 hours of regular annual leave may be avoided since extended illness prevented him from scheduling and using the leave, we have consistently stated that exceptions to the forefeiture rule contained in section 6304(d) are not applicable in a situation involving the buy back of annual leave. *Helen Wakus*, above; *Betty J. Anderson*, B-182608, August 9, 1977. Thus, the 10 hours of annual leave bought back by Mr. Godfrey and subsequently forfeited by operation of section 6304(a) are not eligible for restoration under section 6304(d).

With respect to the 56 hours of previously restored leave, our decision in *Helen Wakus*, cited above, requires that the leave be recredited to leave year 1978. As pointed out by the agency, 5 C.F.R. § 630.306, implementing the restoration of leave provisions in 5 U.S.C. § 6304(d), imposes a 2-year limitation on the use of restored leave. The regulation provides that:

> Annual leave restored under section 6304(d) of title 5, United States Code, must be scheduled and used not later than the end of the leave year ending two years after:
>
> * * * * * * *
>
> (b) The date fixed by the agency head, or his designated official, as the termination date of the exigency of the public business which resulted in forfeiture of the annual leave * * *

Based on the provisions of 5 C.F.R. § 630.306 and explanatory materials issued by the Office of Personnel Management, we have held that leave restored under 5 U.S.C. § 6304(d) which is unused at the end of the 2-year period is again forfeited with no further right to restoration. *Patrick J. Quinlan*, B-188993, December 12, 1977. Also, we have stated that the 2-year limitation may not be waived or modified even where there is an indication of extenuating circumstances. *Patrick J. Quinlan*, above. See also Federal Personnal Manual Letter No. 630-22 (January 11, 1974).

The Department of Labor has advised us that the exigency of public business causing Mr. Godfrey to forfeit the 56 hours of 1977 leave was determined to end on December 31, 1977. By operation of the provisions of 5 C.F.R. § 630.306, the forfeited and restored leave

was again subject to forfeiture at the end of the 1979 leave year. Under the rules stated in *Patrick J. Quinlan*, above, the restored leave recredited to Mr. Godfrey for leave year 1978 and forefeited at the end of leave year 1979 would not be eligible for further restoration to Mr. Godfrey's account.

Although we hold that the 66 hours of leave bought back by Mr. Godfrey may not be restored to his account under section 6304(d), we note that the Department of Labor apparently failed to advise the employee before the buy-back was implemented that a portion of the repurchased leave would be subject to forfeiture. Regulations in 20 C.F.R. § 10.310, governing the buy-back of leave, provide in part that the employing agency "shall help the employee determine how much the 'buy back' cost will be in his or her case." We interpret these provisions as imposing an obligation upon the employing agency to advise the employee of all costs associated with buy-back, including the potential forfeiture of repurchased leave upon reconstruction of the employee's leave account.

Since it appears that the Department of Labor failed to apprise Mr. Godfrey of the consequences of buy-back, we would have no objection, if Mr. Godfrey so elects, to the Department of Labor's retroactively placing him on annual leave for all or part of the 66 hours for the 1978 leave year so as to avoid forfeiture. Mr. Godfrey would thus be entitled to be paid by the Department for the 66 hours of leave at the pay rates then in effect and he would have to refund that portion of employee's compensation covered by that leave. See *Betty J. Anderson,* above.

A review of our prior decisions indicates that the leave forfeiture problems presented by Mr. Godfrey's claim are recurring. See, for example, *Donald A. Adams,* B-204522, March 23, 1982; *John P. Mitchell,* B-180010.12, March 8, 1979; and *Betty J. Anderson* and *Helen Wakus,* above. Therefore, by separate letter to the Director of the Office of Personnel Management (OPM), we are recommending that OPM work with the Office of Workers' Compensation Programs to provide Federal agencies with detailed guidance pertaining to the administration of buy-back of leave.

[B-206111.2, et al.]

Bids—Invitation for Bids—Cancellation—After Bid Opening—Defective Solicitation—Specialty Metals' Procurements

Agency properly canceled solicitation after bid opening where bidders might have offered unacceptable foreign specialty metal products relying on a clause in the solicitation which no longer accurately reflected the agency's interpretation of applicable law, because the solicitation, as written, failed to reflect the Government's needs. 49 Comp. Gen. 606 is distinguished.

Bids—Invitation for Bids—Specialty Metals' Procurements—Domestic Product Preference—Statutory Exceptions—Failure to Reference in Invitation

Agency is not required to warn bidders in solicitation that a statutory exception permits award to bidder offering foreign specialty metal end product where the bid does not exceed $10,000.

Appropriations—Defense Department—Restrictions—Specialty Metals' Procurements—Foreign Product Prohibition

Agency interpretation of Department of Defense Appropriation Act restriction against the purchase of articles consisting of foreign specialty metals as reflected in DAR 6-302 is to be accorded deference. General Accounting Office will not object to DAR 6-302 provision that statutory restriction is met if the specialty metal is melted in the United States, notwithstanding protester's contention that statute requires that such articles be manufactured entirely in the United States. DAR provision is based on wording in legislative history and has been in existence for 10 years without congressional objection.

Matter of: A & P Surgical Company, Inc; Columbia Surgical Instruments Co., Inc., March 16, 1983:

A & P Surgical Company, Inc. (A & P), and Columbia Surgical Instruments Co., Inc. (Columbia), have filed various protests against Defense Logistics Agency (DLA) procurement procedures which authorize the procurement of foreign-manufactured, specialty metal end products for use by the Department of Defense (DOD). For the reasons which follow, we deny all the protests except one filed by Columbia, which we dismiss.

A & P protested against solicitation No. DLA120-82-B-0852 (B-0852) on the basis that the apparent low bidder would furnish specialty metals not manufactured in the United States. DLA thereafter canceled B-0852 and issued solicitation No. DLA120-82-B-1866 (B-1866). DLA's reason for the cancellation was that because the end product consisted of both a plastic and a specialty metal, potential bidders might have been misled by the advice in B-0852 that "any article furnished which is to be comprised *solely* of specialty metals shall be considered a specialty metal * * * within the meaning of Clause I42." DLA's revised solicitation B-1866 warned bidders that the end product sought was considered by DLA to be a specialty metal subject to clause I42. A & P immediately protested the cancellation of B-0852. A & P contends that there was competitive prejudice because the second solicitation resulted in the same bidders bidding the same end items of foreign manufacture. A & P also filed a protest (B-207779.2) against award under the new solicitation (B-1866) on the same ground that it had objected to any award under the B-0852 solicitation.

Columbia's protest (B-207243.2) against solicitation DLA120-82-B-1599 (B-1599), issued jointly by DLA and the Veterans Administration, is on grounds identical to those advanced by A & P, above.

A & P also protested (B-208006) against solicitation No. DLA120-82-R-1660), contending again that the low offeror intended to fur-

nish items not produced entirely in the United States and also the absence of any warning in the solicitation that the statutory preference in favor of domestic specialty metals was inapplicable to procurements not in excess of $10,000.

Columbia also protested (B-207702.2) against solicitation No. DLA120-82-B-1819 (B-1819), advancing the same argument that the low bidder intended to furnish end items not entirely produced in the United States. We dismiss as academic this protest because DLA's rejection of Columbia's bid samples as nonresponsive has rendered Columbia ineligible for award, and Columbia has not contested DLA's rejection.

The major question raised by the protests is the scope of protection against foreign competition afforded specialty metals under the Appropriation Act restriction.

Specifically, the protesters argue that section 723 of the DOD Appropriation Act, 1982, Public Law No. 97-114, approved December 29, 1981, 95 Stat. 1565 at 1582 (Appropriation Act), in conjunction with our decision in *National Graphics, Inc.*, 49 Comp. Gen. 606 (1970), prohibits DOD activities from purchasing specialty metal end products which have not been entirely manufactured within the United States or its possessions.

DLA contends that it can properly purchase such end products if the specialty metals have been melted (the first stage of production) domestically, notwithstanding the fact that the end products are manufactured overseas. DLA cites Defense Acquisition Regulation (DAR) § 6-302 (DAC No. 76-25, October 31, 1980) and the legislative history of various defense appropriation acts as authority for its position.

The practice of attaching specific commodity procurement prohibitions to DOD appropriation acts began in 1941 with the Fifth Supplemental National Defense Appropriation Act, P.L. No. 29, April 5, 1941, 55 Stat. 123. That act prohibited the use of appropriated funds "for the procurement of any article of food or clothing not grown or produced in the United States." 55 Stat. 123, at 125. Since 1941, the Congress has added additional commodities. With the exception of specialty metals, the additions are products of either the clothing or the textile industries. The Appropriation Act here under consideration reads in pertinent part:

> No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding $10,000, shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or specialty metals including stainless steel flatware, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, wool, or specialty metals including stainless steel flatware, grown reprocessed, reused or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procure-

ments outside the United States in support of combat operations, procurements by vessels in procurements * * *.

DAR § 6-302, which implements the Appropriation Act restrictions, reads in pertinent part as follows:

Restriction. Except as provided in 6-303, there shall not be acquired supplies consisting in whole or in part of any food, clothing, * * * coated synthetic fabric, which have not been grown or produced in the United States or its possessions; or specialty metals including stainless steel flatware which have not been melted in steel manufacturing facilities located within the United States or its possessions * * *. DAR § 6-302 (DAC No. 76-25, October 31, 1980).

The protesters argue that the DAR § 6-302 statement that only specialty metals not melted in the United States are prohibited is inconsistent with our decision in 49 Comp. Gen. 606 (1970). In the 1970 decision, referred to by the parties as *National Graphics,* we held that, as regards cotton, another listed commodity in the provision, even though wiping pads were made from cotton grown in the United States, the fact that the pads were of foreign manufacture precluded their purchase with DOD funds. We found the intent of the Congress was that any article of cotton would be considered "American" only when the origin of the raw fiber, as well as each successive stage of manufacture, was domestic. 49 Comp. Gen. 606, 609 (1970).

DLA contends that *National Graphics* is not controlling for specialty metals because of the placement of the specialty metals wording in the statute following the parenthetical phrase "(whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles)" and because it is preceded by the word "or." DLA's argument, with which the protester disagrees, is that such placement shows that specialty metals are to be accorded treatment different from the other listed commodities. Because of the "or" preceding specialty metals, the initial phrase "any article of" would only apply to those items listed before the parenthetical phrase, thus requiring them to be totally domestic, but only requiring specialty metals (in their material stage) to be produced domestically.

The protesters contend that specialty metals should receive the same treatment as the other commodities listed in the Appropriation Act limitation and must be totally manufactured in the United States, not merely melted in the United States. A & P and Columbia also refer to the legislative history of the 1972 Appropriation Act, when specialty metals were added, which contains testimony from industry representatives stating that the specialty metals industry consists of 38 small integrated companies—"intergrated" meaning that they operate melting furnaces as well as finishing facilities for the production of specialty of products. *See* Record of Hearings before the House Committee on DOD Appropriations for 1973 (May 11, 1972), page 338. The protesters state that the Congress was attempting to protect the entire operations of the industry, not just the melting portion of production.

DLA cites House of Representatives Report No. 92-1389 on the 1973 DOD Appropriation Act to show that its regulation (DAR § 6-302) is consistent with the intent of the Congress. At page 770 of the report, it reads:

> The action recommended by the Committee means that no part of any appropriation contained in this Act shall be available or be expended for the procurement of any article containing any specialty metal not melted in steel manufacturing facilities located within the United States or its possessions except to the extent that the Secretary of the Department concerned shall determine that a satisfactory quality and sufficient quantity of any such article containing specialty metals melted in steel manufacturing facilities located within the United States and its possessions cannot be procured as and when needed at United States market prices and except for procurements outside of the United States in support of combat operations.

In addition to the above, both the protesters and DLA have quoted extensively from the legislative histories regarding the 1973 DOD Appropriation Act and other legislation, including the "Berry Amendment" to the DOD 1953 Appropriation Act (Pub. L. 488, 10 July 1952, 66 Stat. 517, 521), which was the forerunner of the current Appropriation Act limitations.

We have carefully considered all the arguments advanced by the protesters, but we believe the critical factor to be that the wording of DAR § 6-302 regarding "melting" appears to be based on interpretation of the Act and House Report 92-1389, and the regulation has been in existence for over 10 years and the Congress has not objected to DOD's interpretation of the statute. We have noted that deference is to be accorded to the interpretation given a statute by the officers or agency charged with its administration. *Colorado State University,* B-194627, December 27, 1979, 79-2 CPD 438. Moreover, we agree with DLA that *National Graphics,* decided before specialty metals was added and DAR § 6-302 was issued, is not controlling here, based on the placement of the wording in the statute.

Since the DAR provision has a reasonable basis and has contained the disputed wording for 10 years without congressional objection, we do not object to the DOD interpretation.

Regarding the cancellation of B-0852, DLA argues that it was proper—

> In order to apprise bidders of a significant change in * * * [DLA's] interpretation of the term "specialty metals" as used in * * * clause I42. Previously, the term has been interpreted by * * * [DLA] as referring to basic specialty metal material only. The interpretation of the term was now broadened by the notice provision to include end products made of specialty metal material. The broadened interpretation was based on the view * * * that basic specialty metals which are stamped, forged, and/or otherwise fabricated into end products are actually specialty metals in other form.

Since the solicitation contained a notice advising bidders that only end items *solely* comprised of specialty metals would be considered specialty metals, DLA believed that the notice could have influenced bidders to offer supplies which were not acceptable. In other words, the bidders might have offered instruments which consisted of stainless steel which was not melted in the United States.

While we agree with A & P that the rejection of all bids and cancellation of a solicitation after bid opening is generally a practice to be avoided because of its adverse effect on the competitive system, we have also found it to be properly within the broad authority of a contracting officer where a cogent and compelling reason justified the cancellation. *Hampton Metropolitan Oil Co.; Utility Petroleum, Inc.,* B-186030, B-186509, December 9, 1976, 76-2 CPD 471. It should be noted, however, that if the Government's needs can be met and competition was achieved, the mere use of inadequate or defective specifications will not alone justify a cancellation. See *The Intermountain Company,* B-182794, July 8, 1975, 75-2 CPD 19.

In this case, we find the cancellation to be proper. The Government's needs were for specialty metals melted in the United States. Bidders could have bid foreign melted specialty metals and, in fact, all six bidders, with the exception of the protester, did so. Apparently the five foreign bidders relied on the fact that the specifications called for a molded plastic cover on the instrument and reasoned that the instrument provided would not be *solely* of specialty metals and, consequently, need not consist of specialty metals melted in the United States. See *E. Miltenberg, Inc.,* B-207346, November 29, 1982, 82-2 CPD 479. Accordingly, the solicitation was defective since it could have misled bidders to offer unacceptable items and cancellation was the proper remedy.

A & P contends that solicitation R-1660 should have warned bidders that the Appropriation Act prohibition against DOD purchase of specialty metals did not apply to procurements not in excess of $10,000. It is DLA's position that the absence of a warning was not prejudicial to either actual or potential bidders since the exception for purchases not exceeding $10,000 had been in annual DOD appropriation acts since the act for fiscal year 1977. We are advised, however, that DLA's solicitations now warn offerors that clause I42 applies only if the resulting award exceeds $10,000.

We find no basis for the position advanced by A & P. We rejected a similar argument in *Crockett Machine Company,* B-189380, February 9, 1978, 78-1 CPD 109, saying "we have seen no argument or evidence of a statutory or regulatory requirement that notice must be given before an exception to the Buy American Act can be invoked." In view of the close relationship between the Buy American Act and the Appropriation Act, we see no reason for a different result here.

The protests are denied, and Columbia's protest against B-1819 is dismissed.

[B-208522]

Fees—Services to the Public—Charges—Cost Recovery

When employees of the Customs Service participate as instructors in programs to train travel agents in Customs requirements and procedures so that the travel agents will, in turn, provide this information to travelers, the Customs Service must charge a fee to recover the full cost of the special benefit conferred. Any receipts may be deposited to the credit of the appropriation of the Customs Service pursuant to 19 U.S.C. 1524.

Matter of: Customs Service Charging User Fees To Recover Cost of Instructing Travel Agents, March 17, 1983:

The Commissioner of Customs asks whether the Customs Service (Customs) may receive free or reduced-rate transportation and accommodations or reimbursements for such costs in connection with the participation of its employees in seminars or training programs at the request of private parties. Subject to the conditions set forth below, we answer this question in the affirmative.

The Customs employees would serve as instructors explaining Customs regulations and procedures, describing how to fill out forms and answering any questions the participants may have on these matters. While participation by Customs employees as instructors in programs of this nature is not an express statutory function of the Customs Service, we have been informally advised by an official of the Customs Service that answering inquiries as to requirements of the Customs laws and procedures is considered an authorized agency activity. However, participating in training as described above is not the normal procedure for accomplishing this activity.

We note that the Customs Service does not possess any general statutory authority to accept and use gifts or donations for agency purposes. Thus if we consider the offered items as donations, acceptance and use by Customs would be precluded as an unauthorized augmentation of their appropriations. See 16 Comp. Gen. 911 (1937). Furthermore, the airlines, schools and travel agents participating in the seminars and providing the offer of the free ticket do not appear to be eleemosynary institutions so that acceptance by the employee of the cost of transportation and accommodation would be authorized by 5 U.S.C. § 4111. Consequently, Customs has proposed that acceptance be considered proper under 31 U.S.C. § 9701[1] authorizing agencies to charge user fees to recipients of special benefits or services.

31 U.S.C. § 9701 provides in pertinent part that:

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

[1]Codified by Pub. L. No. 97-258, September 13, 1982, 96 Stat. 1051 (formerly called the User Charge Statute, 31 U.S.C. § 483a (1976)).

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establising the charge for a service or thing of value provided by the agency. *Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President* and shall be as uniform as practicable. Each charge shall be—
(1) Fair and
(2) Based on—
(A) The costs to the Government;
(B) The value of the service or thing to the recipient;
(C) Public policy or interest served; and
(D) Other relevant facts. * * *" [Italic supplied.]

The Supreme Court has held that whole industries are not in the category of those who may be assessed under the law but instead its thrust reaches only specific charges for specific services to specific individuals or companies.[2] Furthermore, the Court held that OMB Circular A-25, which sets forth the policy to be followed by executive agencies in applying the law, properly construed the law where it states that chargeable services:

Include agency action which "provides special benefits * * * above and beyond those which accrue to the public at large * * *" For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

* * * * * * *

"(c) Is performed at the request of the receipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)." [3]

Finally, it has been the position of this Office and the Courts that while expenses incurred to serve the public generally must be excluded from a fee assessed under the law, a fee may be charged for the full cost of an activity even though the general public secondarily or incidentally benefits from it.[4]

While 31 U.S.C. § 9701 authorizes agencies to charge for services provided to the public, it does not in and of itself provide the authority for agencies to provide the services. Independent authority, either express or implied, must be relied upon to provide the legal basis for an agency undertaking the activity in the first place.[5] Otherwise, the law would provide a facile means for agencies to circumvent congressional or judicial oversight and control over the limits of authorized agency activity.

Here, the Customs Service has informally advised that providing information to the public about procedures and requirements affecting travelers is within the scope of its authorized agency activities. Customs further states that the normal procedure for responding to inquiries is not through seminars but by use of pamphlets or response to questions from travelers at Customs clearance stations. However, here Customs intends to participate at the request of the

[2] *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345 (1974).
[3] See *id.* at 349-351 (particularly f. 3 on 350).
[4] See our decision in the matter of the *Customs Service Recovery of Preclearance (Including TECS) Cost Under User Charge Statute, 31, U.S.C. § 483a*, 59 Comp. Gen. 389 (1980) and *Mississippi Power and Light Co.* v. *United States Nuclear Regulatory Commission*, 601 F.2d 223, 230-231 (5th Cir., 1979).
[5] 28 Comp. Gen. 38 (1948).

program sponsors, and it is the sponsors and the travel agents who will primarily benefit from this activity by having the Customs representatives present to provide responses to any inquiries that may arise following their discussions of Customs clearance procedures and requirements for travelers.

In such a situation, we would have no objection to Customs charging a fee for this service even though some incidential public benefit is also served by their conduct of this activity.[6] However, the fee recovered should be reflective of the full cost of providing the special benefit in question, *i.e.,* the full travel costs of employees who provide the special benefit. We note in this regard that no recovery is proposed to be made for all costs incurred while the employee is in travel status. For example, subsistence or per diem costs (with the possible exception of accommodations) do not appear to have been included in the proposal made by Customs.

Finally, since any cash payments received by Customs under this authority would be for deposit to the credit of the appropriation available to Customs for collecting Customs revenue under authority of 19 U.S.C. § 1524 [7] (if that appropriation bore the cost of providing the services), we would have no objection in similar circumstances to Customs accepting a ticket rather than cash as a payment in kind. However, any limitations on agency payment of expenses for employee travel would still apply and must be complied with in order to prevent the employee's receipt of an unauthorized payment. See 18 U.S.C. § 209.

[B-210478]

Officers and Employees—Transfers—Real Estate Expenses—Time Limitation—Regulation Amendment

Employee is not entitled to reimbursement for real estate expenses incurred in connection with his permanent change of station from New Cumberland, Pa., to Warren, Mich., on May 19, 1980, since settlement date did not occur within 2 years of date on which employee reported to new duty station as required by FTR para. 2-6.1e (May 1973). The amendment to FTR para. 2-6.1e, allowing 1 year extension of 2-year time limitation for completion of residence transactions, is effective only for employees whose entitlement period had not expired prior to Aug. 23, 1982. Since the employee's entitlement period expired prior to that date, the amendment is not applicable.

Matter of: James H. Gordon—Real Estate Expenses—2-Year Time Limitation, March 17, 1983:

The question presented is whether Mr. James H. Gordon, an employee of the Army Tank-Automotive Command, may be reimbursed the expenses he incurred in the sale of a home incident to a permanent change-of-station on May 19, 1980. For the reasons stated below, we hold that he may not be reimbursed.

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[6] See 48 Comp. Gen. 24, 27-28 (1868) and OMB circular A-25, par. 3a(1).
[7] 48 Comp. Gen. 24 (1968).

This decision is in response to a request from Robert A. Kaspari, Finance and Accounting Officer, Army Tank-Automotive Command, Department of the Army. Mr. Gordon was employed by the New Cumberland Army Depot with his duty station located in New Cumberland, Pennsylvania. Due to a reclassification of Mr. Gordon's position, his position was downgraded fron GS-13 to GS-12 effective February 17, 1980. However, Mr. Gordon was entitled to his grade of GS-13 for a 2-year period, provided he did not decline a reasonable offer of a position graded at GS-13 or higher. During March 1980, Mr. Gordon was contacted through the career referral program for a lateral assignment to a grade GS-13 position with the Army Tank-Automotive and Development Command, Warren, Michigan. Mr. Gordon was subsequently selected for that position which he accepted, mindful that to have done otherwise would have caused a loss of his retained grade entitlement. He was transferred to Warren, Michigan, effective May 19, 1980.

In April 1980, incident to the transfer, he put his house in Harrisburg, Pennsylvania, up for sale. The property has been continuously and consecutively listed with 3 realtors. After 1 year elapsed without a sale, Mr. Gordon petitioned and was granted a 1-year extension which expired on May 19, 1982, without a sale. Mr. Gordon lowered the sale price to entice a buyer, but not one offer was made. The Finance and Accounting Officer confirms Mr. Gordon's claim that his inability to sell his house was due to the severely depressed real estate market in the area, coupled with high interest rates.

The first and only offer for Mr. Gordon's house was not made until September 29, 1982. Mr. Gordon accepted this offer notwithstanding that the offer purportedly entailed his suffering a $7,000 loss when the closing took place on December 23, 1982.

Chapter 2 of the Federal Travel Regulations (FTR) (FPMR 101-7) (May 1973), issued by the General Services Administration, governs the entitlements of civilian employees of the Federal Government to relocation allowances. Para. 2-6.1 provides for reimbursing an employee for the expenses of selling a residence at his old official station and of purchasing a residence at his new station. However, at the time in question para. 2-6.1(e) of the FTR imposed a time limitation on such sales and purchases, as follows:

> e. Time limitation. The settlement dates for the sale and purchase or lease termination transactions for which reimbursement is requested are not later than 1 (initial) year after the date on which the employee reported for duty at the new official station. Upon an employee's written request this time limit for completion of the sale and purchase or lease termination transaction may be extended by the head of the agency or his designee for an additional period of time, not to exceed 1 year regardless of the reasons therefor so long as it is determined that the particular residence transaction is reasonably related to the transfer of official station.

As the above regulation makes clear, the additional period of time after the initial 1-year period may not be extended beyond 1 year. *Erwin A. Keith,* B-204443, April 5, 1982. While we do not

question the contention that Mr. Gordon was unable to sell his residence within the 2-year period as a result of conditions that were essentially beyond his control, the provisions of the Federal Travel Regulations may not be waived or modified by this Office or the agency concerned even though an employee's inability to sell his residence may be due to difficulties in the housing market caused by financing constraints or other factors. See *William R. Walberg,* 58 Comp. Gen. 539 (1979); *Krim M. Ballentine,* B-193607, March 8, 1979; and *C. Curtis Johnson,* B-202402, November 5, 1981.

Mr. Gordon has noted that the General Services Administration has issued a change to FTR para. 2-6.1e which extends the residence transaction eligibility period for an additional year beyond the 2-year period when necessary. GSA Bulletin FPMR A-40, Supplement 4, 47 Fed. Reg. 44,565, October 8, 1982. However, the revision is effective only for employees whose entitlement period would not have expired prior to the issuance date (signature date) of Supplement 4. The signature date was August 23, 1982. Unfortunately, Mr. Gordon's entitlement period expired on May 19, 1982. Therefore, the revision to the FTRs allowing for a third year to complete residence transactions is not applicable to Mr. Gordon.

Nor may Mr. Gordon be reimbursed for the loss he suffered when he ultimately sold his residence. Reimbursement for losses on the sale of a residence is specifically prohibited by 5 U.S.C. § 5724a(a)(4). FTR para. 2-6.2e, which implements that provision, provides that losses due to failure to sell a residence at the old duty station at the price asked, and any similar losses, are not reimbursable.

Accordingly, there is no authority to allow Mr. Gordon's claim for real estate expenses.

[B-207370]

Pay—Active Duty—Concurrent Retired, etc. Pay

An Air Force officer who is removed from the temporary disability retired list and placed on the active duty list for 1 day on the 31st day of the month, and retired for years of service the next day, is entitled to a full month's retired pay in addition to pay for the 1 day of active duty.

Pay—Retired—Reservists—Waiver of Retired Pay—Reserve Duty on Thirty-First Day of the Month

Retired members of the armed services who perform Reserve duty, active or inactive, on the 31st day of a calendar month must waive 1 day's retired pay (or other compensation received on account of their prior service) in order to be entitled to active duty pay or inactive duty pay which would otherwise accrue for that day. This is required by 10 U.S.C. 684.

Matter of: Colonel James W. Fischer, USAF (Retired), March 22, 1983:

Colonel James W. Fischer, USAF (Retired), was removed from the temporary disability retired list on October 30, 1981, because it

had been determined that he was fit for duty. He was placed on the active duty list on October 31, 1981, and served only 1 day before being retired for years of service on November 1. He is entitled to active duty pay for October 31 even though he is also entitled to a full month's retired pay for the 30 days he was on the retired list in October.

This decision is in response to a request for an advance decision from an Accounting and Finance Officer, Air Force Accounting and Finance Center, and was assigned submission number DO-AF-1392 by the Department of Defense Military Pay and Allowance Committee. The accounting and finance officer questions the validity of a military pay voucher for 1 day of active duty pay which accrued on October 31, 1981. In addition, a question is asked regarding the pay entitlement of retirees who are called to Reserve duty, active or inactive, on the 31st day of a month.

Colonel Fischer was placed on the temporary disability retired list on January 16, 1979, and remained in that status through October 30, 1981, when he was removed from the retired list because it had been determined that he was physically fit for duty. He was reappointed to the active list in the Regular Air Force for 1 day, October 31, 1981, in order to establish a basis for retirement for length of service, effective November 1, 1981.

Pay and Allowances for Active Duty

Colonel Fischer was ordered to active duty and reappointed to the active duty list of the Regular Air Force effective October 31, 1981. He did, in fact, report for active duty on that day. A member is entitled to receive active duty pay and allowances beginning on the first day of service on a call-up for active duty and such entitlement continues until he is released from such duty, plus allowable traveltime. 54 Comp. Gen. 952, 955 (1975).

Computation of pay and allowances when the member's service is for less than a month is governed by 37 U.S.C § 1004, which provides:

> A member of a uniformed service who is entitled to pay and allowances under this title for a continuous period of less than one month is entitled to his pay and allowances for each day of that period at the rate of 1/30 of the monthly amount of his pay and allowances. The thirty-first day of a calendar month may not be excluded from a computation under this section.

Although at one time the method of computation outlined in section 1004 was available only to reservists, the section has since been construed as applying to both Reserve and Regular forces. 54 Comp. Gen. 952, 954 (1975); 46 *id.* 100 (1966). The 1 day of active duty is this case, being a period of less than a month falling on the 31st day of the month, is clearly encompassed by the language of section 1004 and, therefore, active duty pay and allowances for that day are payable.

Disability Retired Pay

Retired pay is paid monthly under the rules in 5 U.S.C § 5505 (1976). As was stated in 48 Comp. Gen. 152, 158 (1968):

> * * * Military retired pay accrues on a monthly basis. Note 10 U.S.C. §§ 1401, 3991, 8991. Monthly compensation (including retired pay) is computed as if each month had 30 days. No compensation (and no retired pay) accrues on the 31st day of any month.* * *

Under the monthly computation formula of 5 U.S.C § 5505, the 31st day of a calendar month is ignored. Pay for 1 day's absence on the 31st must be forfeited under that section only if the absence is "unauthorized."

Colonel Fischer was validly reappointed and recalled to active duty on October 31 pursuant to the established procedure. The date for his voluntary retirement was also mandated since members are relieved from assignment and duty on the last day of the month and are retired effective the first day of the following month. *See* 5 U.S.C. § 8301 (1976); and Air Force Regulation 35-7, para. 2-7, September 15, 1981. Accordingly, the provision of 5 U.S.C § 5505 regarding unauthorized absences is not involved in this case.

Since Colonel Fischer is entitled to temporary disability retired pay for 30 of the 31 days in October he is entitled to a full month's pay under the provision of 5 U.S.C § 5505. We find no legal basis to reduce his retired pay entitlement. He was in a retired status for 30 days during October 1981 and on active duty on the 31st. Therefore, Colonel Fischer is entitled to receive payment of full temporary disability retired pay for the month of October in addition to pay and allowances for active duty served on October 31, 1981. In accordance with the applicable statutory provisions, payment of the voucher for active duty pay is authorized, if otherwise correct.

Retired Reservists Generally

Regarding the propriety of paying retirees who maintain an active Reserve status and who perform active duty or inactive duty on the 31st day of a month, entitlement to pay for these members is provided by 37 U.S.C. §§ 204 and 206, respectively. As noted above, active duty pay for a period of less than 30 days is computed under 37 U.S.C. § 1004 (1976) for both Regular members and reservists.

Under 37 U.S.C. § 206 (1976), for each period of inactive duty, the reservists are entitled to 1/30th of a month's pay.

However, paying a retiree for services performed on active duty or inactive duty training as a member of the Reserves is also governed by the provisions of 10 U.S.C. § 684(a), which provide:

> (a) Except as provided by subsection (b), a Reserve of the Army, Navy, Air Force, Marine Corps, or Coast Guard who because of his earlier military service is entitled to a pension, retired or retainer pay, or disability compensation, and who performs duty for which he is entitled to compensation, may elect to receive for that duty either—

(1) the payments to which he is entitled because of his earlier military service; or
(2) if he specifically waives those payments, the pay and allowances authorized by law for the duty that he is performing.

Considering the provisions of 10 U.S.C. § 684 as they relate to the situation of a retiree who performs inactive duty training or less than 30 days' active duty, those provisions require waiver of retired pay in order for the member to be entitled to active duty or inactive duty pay. It may be argued that, since no retired pay accrues on the 31st day of the month under the provisions of 5 U.S.C. § 5505, a waiver of retired pay entitlements does not require the reduction of retired pay when the drill pay or active duty pay is paid for the 31st. However, the provisions of 10 US.C. § 684 contemplate that something will be waived in these circumstances. That is, an individual will not be able to retain the full benefits which accrued because of prior service and the pay which accrues for the service currently being performed. On the other hand, 5 U.S.C. § 5505 is a general provision concerned only with disbursing pay which accrues on a monthly basis in view of the differing lengths of months. In applying the dual compensation provision to a retired officer who was employed in a Federal civilian position on the 31st day of the month, it was held that 1 day of retired pay must be waived in order to permit payment of civilian compensation. In that case also no retired pay accrued on the 31st of the month. B-120722, October 18, 1954.

It is also noted that paragraph 30124 of the Military Retired Pay Manual, Department of Defense Manual, 1340.12M, requires the waiver of 1 day's retired pay for each calendar day of entitlement to active duty pay or drill pay. No exception is made for active duty or drill on the 31st day of a month. Regulations of the agency involved are to be given great weight in interpreting a provision of law. Thus, this regulation supports a determination that waiver of a day's retired pay or other compensation predicated on prior service is required in order for a Reserve member to be entitled to active duty or inactive duty pay for the 31st day of a month. Therefore, we find that the waiver provision (section 684) should be interpreted to mean that 1 day's retired pay must be waived even if the active duty or inactive duty training is performed on the 31st day of the month.

[B-209150]

Subsistence—Per Diem—Fractional Days—Thirty-Minute Period at Beginning or End

The 30-minute rule applicable to the payment of per diem under para. 1-7.6e, FTR, when the time of departure or arrival is within 30 minutes before or after the beginning of a quarter, respectively, is not intended to be applicable to continuous travel of 24 hours or less. 40 Comp. Gen. 400 (1961).

Matter of: Lloyd G. Chynoweth, March 22, 1983:

A certifying officer for the Department of the Interior requests our decision whether the 30-minute rule stated in paragraph 1-7.6e of the Federal Travel Regulations (FTR) (FPMR 101-7), for computing per diem allowances, applies to travel of 24 hours or less. For the reasons that follow we hold that the 30-minute rule is not applicable to such travel.

On August 20, 1982, Mr. Lloyd G. Chynoweth, an employee of the Bureau of Reclamation, Department of the Interior, left Billings, Montana, his permanent duty station, at 5:45 a.m., flew to Pierre, South Dakota, and returned to Billings at 6:15 p.m. the same day. He claimed three quarters of a day per diem based on actual time in an official travel status of 12½ hours. His per diem entitlement was reduced to two quarters by a voucher examiner on the basis that he had failed to provide a statement justifying the necessity for his departure within 30 minutes prior to the end of a quarter day and his return within 30 minutes after the beginning of a quarter day.

Paragraph 1-7.6d(1) of the FTR, as amended by GSA Bulletin A-40, Supp. 1, September 28, 1981, provides in part:

> *Travel of 24 hours or less.* For continuous travel of 24 hours or less, the travel period shall be regarded as commencing with the beginning of the travel and ending with its completion and for each 6-hour portion of the period, or fraction of such portion, one-fourth of the per diem rate for a calendar day will be allowed. * * *

Unlike travel of 24 hours or less, per diem for travel of more than 24 hours is paid on a calendar day basis with one fourth of the rate allowed for each quarter of a calendar day that the employee is in a travel status. FTR paragraph 1-7.6d(2).

The question here involves the applicability of the 30-minute rule set forth in FTR paragraph 1-7.6e, which provides:

> *Beginning and ending of entitlement.* For computing per diem allowances official travel begins at the time the traveler leaves his/her home, office, or other point of departure and ends when the traveler returns to his/her home, office, or other point at the conclusion of his trip. However, when the time of departure is within 30 minutes prior to the end of a quarter day, or the time of return is within 30 minutes after the beginning of a quarter day, per diem for either such quarter day shall not be allowed in the absence of a statement with the travel voucher explaining the official necessity for the time of departure or return.

As first incorporated into the regulations (Standardized Government Travel Regulations (SGTR) section 6.9c(2)) on April 6, 1960, the 30-minute rule was identically worded but applicable only to travel by privately owned vehicle. At that time SGTR paragraph 6.11 contained essentially the same per diem computation principles as are now set forth in FTR paragraphs 1-7.6d (1) and (2). Because per diem for travel of 24 hours or less was not based on calendar day quarters, we held that the language of the 30-minute rule—specifically, its use of the term "quarter day"—was not intended to be applicable to travel of 24 hours or less. 40 Comp. Gen. 400 (1961). Although the regulations have since been amended to

include regularly scheduled means of transportation within the purview of the 30-minute rule, the language in question and the per diem computation principles to which it applies remain the same. For this reason we find no basis to change our view that the 30-minute rule applies to per diem paid on the basis of calendar day quarters—i.e., travel of more than 24 hours—and not to per diem such as paid Mr. Chynoweth on the basis of 6-hour period of actual time in a travel status.

Accordingly, Mr. Chynoweth is entitled to three quarters of a day per diem as claimed.

[B-206798]

Contracts—Small Business Concerns—Awards—Set-Asides—Administrative Determination—Reasonable Expectation of Competition

A determination to set aside for small businesses Federal Supply Service (FSS) multiple award contracts for a category of broadly described instruments, solely on the basis that an adequate number of small businesses will submit offers, is improper where the evidence available to the contracting officer at the time the determination is made suggests that only one small business firm can supply a portion of the models and that firm has received the large majority in dollar terms of FSS sales of those particular instruments under a previous FSS set-aside.

Matter of: DISA Electronics, March 25, 1983:

DISA Electronics, a large business, protests the General Services Administration's (GSA) determination to set aside for small businesses 100 percent of the multiple award contracts for velocimeters (an instrument that measures the velocity of gas and liquid flows) on Federal Supply Schedule (FSS) solicitation No. FCGS-H-36399-N-3-19-82. DISA alleges that the set-aside is improper because there is actually only one small business capable of supplying the most sophisticated models of velocimeters.

We sustain the protest.

The particular FSS under which GSA sought these contracts is nonmandatory upon Government agencies except GSA; that is, agencies are not required to purchase the items listed on that schedule from that schedule. *See* 41 C.F.R. § 101-26. 401-5(a) (1981). GSA set aside these contracts for velocimeters and velocimeter components in 1981 on the basis of results of the previous year's competition, in which five small businesses and DISA bid on and received contracts to supply velocimeters. During 1981, GSA awarded FSS contracts to three small businesses. In 1982, GSA continued the set-aside, during which the agency again awarded contracts to three small businesses. For the 1983 FSS, the schedule with which we are concerned here, GSA received offers from four small businesses.

DISA contends that GSA's set-aside determination did not comply with applicable regulations, which require that those deter-

minations be based on "a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible concerns * * * so that awards will be made at reasonable prices." Federal Procurement Regulations (FPR) § 1-1.706-5(a) (1964 ed.). Since only one small business, TSI Incorporated, produces the most technically sophisticated and expensive velocimeters, DISA argues, the contracting officer had an obligation to look beyond the number of small businesses participating and establish whether competition existed among them. The effect of the set-aside, the firm asserts, is to give TSI a noncompetitive sole-source contract to supply the top-of-the-line models. This in turn, DISA continues, encourages TSI to charge unreasonable prices for those models. DISA buttresses these assertions by noting that TSI's reported Government sales of velocimeters during the first year of the set-aside amounted to 88 percent of the total sales of velocimeters reported by the three small businesses then on the FSS. Those statistics, the firm believes, indicate that the purchase of the sophisticated models, which only TSI can supply, probably accounts for 75 percent of all FSS sales of velocimeters. Thus, DISA concludes that the set-aside was improper.

GSA asserts that its set-aside determination was reasonable. In this regard, GSA notes that its initial set-aside determination in 1981 was based on the fact that the five small business contractors on the schedule in 1980 accounted for 85 percent of the dollars for velocimeter sales reported by those FSS contractors during that year. For the first 2 years of the set-aside, GSA states, three small businesses received contracts, which was sufficient small business participation to ensure competition and justify the set-aside. Under the present solicitation, GSA continues, four small businesses sought contracts and those small businesses together offered a full range of velocimeters. Since the purpose of the FSS is to make available to using agencies a wide range of functionally similar products, GSA argues, a set-aside is proper where that purpose may still be accomplished and there is sufficient participation from small businesses.

A contracting officer's determination to set aside a particular procurement exclusively for small businesses is basically a business judgment that this Office will sustain absent a clear showing of abuse of discretion. *U.S. Divers Company,* B-192867, February 26, 1979, 79-1 CPD 132. In making his determination, a contracting officer may rely in most instances on information indicating that small businesses have experience in producing items that are the same or similar to those requested by the solicitation. *Gill Marketing Co., Inc.,* B-194414.3, March 24, 1980, 80-1 CPD 213. Generally, there is no legal requirement that a contracting officer, when setting aside items on the FSS, perform an in-depth evaluation of the quality of equipment available from small businesses or of each individual agency's needs. *Id.*

The central question DISA raises is whether a set-aside of FSS multiple award contracts for velocimeters was improper where only one small business firm could supply top-of-the-line models or their component parts and that firm had received, in dollar terms, the "lion's share" of the velocimeter sales under a previous year's set-aside. We conclude that, under those circumstances, the contracting officer was required to consider those factors, as well as the number of small businesses that would submit offers, in determining that the total set-aside was appropriate.

The solicitation in question requested offers in the form of catalog and published price lists along with discounts from the published prices for a variety of instrumentation and accessories. The item in question here—designated FSC class 6655, Special Item 66-273—was described, as were other items in the solicitation, only by the broad item description, "velocimeters and directly related accessories," instead of by detailed specifications. Thus, the solicitation did not differentiate between degrees of sophistication of instruments falling within the broad category of instruments known as "velocimeters."

We have recognized this as a legitimate means of soliciting FSS multiple award contracts since the purpose of the broad item description is only to identify as closely as practicable a wide range of comparable items in order to inform using agencies generally of the related items contractors are able to supply. Thus, considering this basic purpose of these solicitations, it follows, under most circumstances, that the contracting officer's determination respecting the availability of adequate small business competition may be based on the broad item description, rather than on any particular item that falls within the broader category.

Where, however, only one small firm is able to supply a portion of the models of the item broadly described under previous set-asides, we believe that the total set-aside of the broad category of items does not promote effectively the set-side's purpose of encouraging a variety of small businesses to participate in Government procurements. There is no disagreement here that there is an adequate number of small businesses able to supply the broad category of instruments described as "velocimeters." In addition, we do not dispute that the contracting officer had a reasonable basis for his initial set-aside determination in 1981, after five small businesses had received 85 percent of the velocimeter sales during the previous, non-set-aside year. However, where the apparent absence of competition for a substantial portion of the item is brought to the attention of the agency, we believe that the contracting officer must obtain the data necessary to support any further set-aside. Since the record here does not indicate that the contracting officer considered the previous years' sales information, we conclude that the set-aside of the broad category of instruments described as "ve-

locimeters," based merely on the number of small businesses expected to submit offers, was improper.

Therefore, we are recommending in a letter to the Administrator of GSA that, for the 1984 FSS, GSA obtain data specifying the types of velocimeters or velocimeter components purchased by the Government under previous FSS set-asides and, if that data reveals that there is in fact no reasonable expectation of competition for particular types of velocimeters, that the 1984 FSS contracts for those particular velocimeters not be set aside.

The protest is sustained.

[B-210565]

General Accounting Office—Jurisdiction—Labor-Management Relations—Requests for Decisions—Declined

Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to General Accounting Office (GAO) and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter.

Matter of: American Federation of Government Employees, Local 2459—Implementation of Arbitration Award, March 25, 1983:

Local 2459, American Federation of Government Employees, Federal Correctional Institution, Texarkana, Texas, has requested a decision pursuant to 4 C.F.R. Part 22 (1982) concerning implementation of an arbitration award. A portion of the award was set aside by the Federal Labor Relations Authority (hereinafter the Authority) in *Federal Prison System and American Federation of Government Employees, Local 2459*, 8 FLRA 103, February 10, 1982. The Department of Justice has filed timely objections to the union's submission of the matter to GAO. For the reasons stated below, we decline to assert jurisdiction in accordance with 4 C.F.R. Part 22 (1982).

On March 21, 1980, Arbitrator Preston J. Moore issued an award finding, in pertinent part, that the preshift and postshift activities of the employees involved could not legally constitute hours of work. On this basis, the employees' grievance for overtime pay was denied. The union appealed the award and the Authority set aside that portion of the award. It held that the preshift and postshift activities of employees at Texarkana were hours of work within the meaning of 5 U.S.C. § 5542. However, the Authority made no determination as to the amount of compensation, if any, due employees and stated that such a determination "* * * must be made in accordance with applicable laws and regulations and is for resolution in a manner deemed appropriate by the parties." 8 FLRA 103, 105 at note 4.

On January 14, 1983, AFGE Local 2459 submitted the matter to GAO, noting that the parties had been unable to reach agreement as to the amount of compensation, if any, due employees. The two questions submitted for our decision were:

(1) What amount of overtime pay per day are the employees at F.C.I. Texarkana entitled to?

(2) Are the employees entitled to overtime compensation, retroactive to March 8, 1979?

By letter dated January 31, 1983, the Department of Justice has objected to submission of this matter to GAO and has shown that a number of factual issues must be resolved before a determination can be made as to the amount of overtime pay due employees, if any. For example, neither the award nor the decision of the Authority in 8 FLRA 103 addresses the questions of which employees in the unit are affected by the award; how much overtime is claimed by affected employees; how to treat time spent in the towers allegedly performing preshift duties, etc.

It is clear, therefore, that this matter concerns a dispute over the implementation of the decision of the Authority. In the absence of a request for an advisory opinion pursuant to 4 C.F.R. § 22.5, or a joint request from the parties based upon a mutually agreed upon statement of facts, the matter is not appropriate for decision by this Office. See 4 C.F.R. § 22.7(a); *Gerald M. Hegarty,* 60 Comp. Gen. 578 (1981). 4 C.F.R. § 22.7(b); *Lawrence L. Longsdorf,* 61 Comp. Gen. 513 (1982). If the parties cannot reach agreement, the matter is more appropriately resolved through the procedures authorized by 5 U.S.C. Chapter 71. See 4 C.F.R. § 22.8; *Headquarters, U.S. Army Communications Command, et al., Fort Hauchuca, Arizona,* 2 FLRA 785, 789 (1980); *U.S. Army Health Clinic, Fort Richie, Maryland and NFFE Local 1153,* 9 FLRA 935 (1982).

Accordingly, in the absence of a request for an advisory opinion from an arbitrator or other neutral pursuant to 4 C.F.R. § 22.5, or a joint request from the parties for a decision based upon a mutually agreed upon statement of facts pursuant to 4 C.F.R. § 22.7(b), we decline to assert jurisdiction at this time.

[B-208480, B-208481]

Statutes of Limitation—Claims—Date of Accural—Compensation Payments—Backpay

Two employees were awarded backpay pursuant to a Dec. 10, 1973 ruling by the Board of Appeals and Review of the Civil Service Commission that they had involuntarily resigned from their positions in 1972. The employees' claims that overtime earnings were improperly deducted form their backpay awards were received in this Office on June 16 and July 14, 1980. The claims may not be allowed since they accrued on Dec. 10, 1973, the date of the Board's determination, and 31 U.S.C. 71a (1976) (now sec. 3702) bars consideration of claims received in this Office more than 6 years after the date the claims first accrues. 61 Comp. Gen. 57 is amplified.

Matter of: Leverett C. Burke and James E. Mole—Statute of Limitations—Backpay, March 28, 1983:

This action is in response to a letter from the law firm of Shein and Brookman, on behalf of two employees of the U.S. Customs Service, appealing our Claims Group's settlements, which determined that the employees' overtime earnings during the period of an improper personnel action must be deducted from Federal backpay. We hold that the employees' claims are barred by the 6-year statute of limitations stated in 31 U.S.C. §71a (1976), now § 3702.

Messrs. Leverett C. Burke and James E. Mole resigned from their positions as Customs Patrol Officers on March 22, and March 23, 1972, respectively. On December 10, 1973, the Board of Appeals and Review of the Civil Service Commission (now Office of Personnel Management) determined that the employees' resignations were involuntary, and ordered that the employees be reinstated to their positions. The employees were reinstated retroactively on December 27, 1973. Each employee was awarded backpay under the Back Pay Act, 5 U.S.C. § 5596 (1976), beginning on the date of his involuntary resignation and terminating on the date of his reinstatement.

Although the employees questioned the agency's computation of backpay, charging that Customs improperly deducted interim earnings attributable to overtime work, Messrs. Mole and Burke did not file claims with our Office until June 16 and July 14, 1980, respectively. Our Claims Group denied the employees' requests for recomputation of backpay, holding that the overtime earnings were properly deducted since the employees failed to show that they were engaged in outside work prior to the improper personnel action.

On appeal, Messrs. Burke and Mole maintain that the overtime earnings should not have been deducted from backpay since these earnings were for work performed outside of their regular hours of employment with the Government. In support of this position, the employees cite the U.S. District Court's decision in *Payne* v. *Panama Canal Company,* 428 F. Supp. 997 (D.C.C.Z. 1977), reversed on other grounds, 607 F.2d 155 (5th Cir. 1979), holding that only compensation earned by an employee during a 40-hour workweek may be offset against backpay.

The substantive merits of the claims are irrelevant, however, because we find that the claims are time-barred under the statute of limitations stated in 31 U.S.C. § 71a (1976), now 31 U.S.C. § 3702(b), as codified by Public Law 97-258, September 13, 1982, 96 Stat. 877. Section 71a provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in our Office within 6 years after the date it first accrued or be forever barred.

Following an established line of court decisions, our Office has recognized two categories of backpay claims for purposes of apply-

ing the 6-year limitations period stated in 31 U.S.C. § 71a. In the first category are backpay claims which are payable at the time the employee performs services for which compensation is denied; there is no other condition precedent to payment of the claim, such as an administrative body's factual or legal determination that the employee is entitled to backpay. Claims in the first category accrue at the time the work is performed, and the 6-year barring act begins to run at that time. See 58 Comp. Gen. 3 (1978). See generally *Friedman* v. *United States,* 310 F.2d 381 (Ct. Cl. 1962).

Backpay claims in the second category are those based on statutes which require an administrative determination of the validity of the backpay claim in order for the claim to be payable. In these cases, the employee's statutory claim for backpay is not established until the designated agency has acted or declined to act, and the claim accrues as a whole on the date of the administrative determination. *Ralph C. Harbin,* 61 Comp. Gen. 57 (1981). See also *Friedman* v. *United States,* cited above; *Feldman* v. *United States,* 181 F. Supp. 393 (Ct. Cl. 1960).

Within the latter category are claims based on the Back Pay Act, 5 U.S.C. § 5596, the provisions of which authorize backpay for an employee who is found by an "appropriate authority" to have undergone an unjustified or unwarranted personnel action resulting in the withdrawal or reduction of pay or allowances. See *Ralph C. Harbin,* above. Under implementing regulations set forth at 5 C.F.R. § 550.803(c) (1973), in effect at the time the Board of Appeals and Review determined that Messrs. Burke's and Mole's resignations were involuntary, the term "appropriate authority" included the Civil Service Commission, of which the Board of Appeals and Review was a part.

As indicated previously, the Board of Appeals and Review decided on December 10, 1973, that Messrs. Burke and Mole had involuntarily resigned from their positions and were entitled to reinstatement with backpay. On that date, the two employees' claims for backpay accrued as a whole. Since their claims for recomputation of backpay were received in this Office on June 16 and July 14, 1980, more than 6 years from the date they first accrued, they are barred by the above-cited Act and may not be considered by this Office. Although the claims may have been submitted to Customs at an earlier date, we have consistently held that the filing of a claim with the administrative agency concerned does not toll the running of the statute. *James W. Gregory,* B–201936, April 21, 1981.

Accordingly, on this basis, the claims are denied.

[B-208513]

Travel Expenses—Air Travel—Fly America Act—Employees' Liability—Travel by Noncertificated Air Carriers

Under guidelines issued by the Comptroller General, reasons for use of foreign air carrier must be properly certified. Comptroller General decisions contain guidelines regarding the adequacy of reasons for utilizing a foreign carrier. The Joint Travel Regulations require a determination of unavailability by the transportation or other appropriate officer and the requirements contained therein are in keeping with the Comptroller General's guidelines and reimbursement is not authorized absent compliance.

Matter of: Mr. John King, Jr.—Reimbursement for Use of Noncertificated Air Carrier, March 28, 1983:

This action is in response to a request for a decision from R. G. Bordley, Chief, Accounting and Finance Division, Office of the Comptroller, Defense Logistics Agency, concerning a claim for reimbursement by an employee for airfare paid for travel by foreign air carrier from New York City to Hamburg, Germany, during June 1979. The request, forwarded by the Per Diem, Travel and Transportation Allowance Committee, has been assigned PDTATAC Control No. 82-18. On the basis of the documentation presented for decision we conclude that the employee may not be reimbursed.

The record shows that John King, Jr., was directed to report for duty in Nuernberg, Germany, on June 28, 1979. Immediately upon receiving his orders on June 16, 1979, he went to the local Transportation Office at McConnell Air Force Base, Kansas, to determine the mode of travel. Mr. King was informed that military transportation would be unavailable on such short notice and that he would have to make his own travel arrangements. He states that he was not informed of any restrictions on reimbursement for travel performed on foreign air carriers. Moreover, he claims that the travel agency that made the arrangements was unable to get him a reservation on a certificated air carrier. Acting on the advice of an Army Finance and Accounting Center officer, Mr. King submitted a supplemental voucher which was honored with a reimbursement of $236, representing the cost of travel from CONUS by Military Airlift Command. Mr. King now seeks reimbursement of the additional $228 expended by him for airline transportation.

As a basis for favorably considering his request for reimbursement, we have been furnished a memorandum recommending reimbursement for the full fare unless someone can challenge the claimant's allegation that an American-flag carrier was unavailable and suggesting that paragraph C2206 of Volume 2 of the Joint Travel Regulations (2 JTR) permits payment for foreign air carrier transportation based on a traveler's certification that use of a foreign carrier was necessary.

We have held that a certificate by the traveler stating that his use of a foreign carrier was necessary because U.S. air carrier service was unavailable is not in itself sufficient to authorized reimbursement for the cost of his flight. *Matter of Mitchell,* B-203010, August 4, 1981. The "Fly America" provisions of 49 U.S.C. § 1517 prohibit this Office from allowing any expenditure from appropriated funds for transportation of personnel or cargo on a non-certificated foreign-flag carrier in the absence of satisfactory proof of its necessity. Our guidelines of March 12, 1976, which were in force at the time, required submission of a certificate or memorandum with each voucher for foreign air travel adequately explaining the reasons why certificated air carriers were unavailable. Those guidelines have been amplified in various decisions.

In keeping with the statute, and the Comptroller General's guidelines and decisions, paragraph C2204-2d of 2 JTR requires a determination by the transportation or other appropriate officer that certificated air carriers are unavailable. The determination of unavailability is required to be made in accordance with the standards set forth in 2 JTR para. C2204-2. That regulation reflects the Comptroller General's guidelines and decisions implementing the Fly America Act.

Consistent with our holding at 55 Comp. Gen. 1230 (1976), 2 JTR para. 2204-2e in effect at the date of Mr. King's travel provided that when U.S. air carriers do not offer through service between an employee's origin and destination, the traveler is required to use U.S. air carrier service available at origin to the furthest practicable interchange point on a usually traveled route.

In June of 1979 there was air carrier service to Nuernberg from more than two dozen cities in Europe. Since U.S. air carriers offered service between the United States and many of those European cities it is most unlikely that U.S. air carrier service was unavailable for the transoceanic portion of Mr. King's travel. Given the particular destination involved, Mr. King's statement that his travel agency tried but was unable to get U.S. air carrier reservations does not itself afford a transportation officer an appropriate basis to determine that U.S. air carrier service was unavailable under the standards set forth in 2 JTR para. C2204-2.

While the circumstances surrounding Mr. King's departure from the United States were less than optimum, we must note that the requirement to fly aboard certificated carriers is not in the nature of a mere "policy." The "Fly America Act" is a mandatory statutory provision with respect to which Government travelers are deemed to be on notice. *Matter of Jacobius,* B-186007, November 15, 1976. The employee is personally liable for noncompliance with the "Fly America Act." *Matter of Benton,* B-188968, October 17, 1978.

Moreover, the traveler may not be relieved of personal liability because of ignorance of the law or because others made travel ar-

rangements for him. *Matter of Otway,* 58 Comp. Gen. 612 (1979); *Matter of Young,* B-192522, January 30, 1979, affirmed April 22, 1981.

Accordingly, Mr. King's claim is denied. His liability for improper travel by non-certificated air carrier should be computed on the basis of the formula set forth in 56 Comp. Gen. 209 (1977) and as much of the $236 amount as is determined to have been improperly paid to Mr. King should be recovered.

[B-209615]

Claims—Reporting to Congress—Meritorious Claims Act—Reporting Not Warranted

The Secretary of the Army denied a deceased civilian employee's representative's claim under 10 U.S.C. 2733 for wrongful death damages allegedly caused by malpractice of Army medical officials. As to the Comptroller General reporting the matter to Congress as a meritorious claim under 31 U.S.C. 3702(d) (formerly 31 U.S.C. 236), that provision is construed to apply only to claims which fall within General Accounting Office's (GAO) settlement authority. Since, under 10 U.S.C. 2733 and 2735, the Army's settlement of a claim for damages is final and conclusive, GAO has no authority in the matter and the claim is inappropriate for reporting to Congress under the Act.

Matter of: Suzanne C. Cramond, March 28, 1983:

This action is in response to a letter, with supporting brief, from Mrs. Suzanne C. Cramond, through her counsel, who is the representative of Mr. John Cramond, Jr., a deceased former employee of the Air Force who had retired on disability. Mrs. Cramond alleges that malpractice of Government officials who were treating Mr. Cramond while he was working for the Air Force in Germany, and their abandonment of his treatment after his disability retirement, proximately caused her husband's death. She requests that we assist in securing damages for his wrongful death by reporting the matter to Congress for relief under the Meritorious Claims Act of 1928, now codified at 31 U.S.C. § 3702(d) (formerly 31 U.S.C. § 236). The claim is not appropriate for us to consider for submission to the Congress.

The claim arose under the following circumstances. Mr. John Cramond, a civilian working for the Air Force at the Pentagon, began experiencing a series of seizures in late 1971 and early 1972. He was transferred and moved with his wife Suzanne and their children to Weisbaden, Germany, in July 1972, where he continued having seizures. These seizures were treated by medical personnel at various service hospitals in Germany, including the U.S. Army Hospital at Landstuhl. In May of 1974 surgery was performed on Mr. Cramond at the U.S. Air Force Hospital at Weisbaden to remove a brain tumor. However, he continued to have seizures after the operation and was treated at the Landstuhl Army Hospital. He was retired for disability in Germany in November 1974. In August 1975 Mr. Cramond, still in Germany, fell while apparently

having a seizure, hit his head on a curb, and died shortly thereafter.

Mrs. Cramond, as representative of her deceased husband, filed a claim under 10 U.S.C. § 2733 with the Army for the surviving family. She alleged negligent treatment of Mr. Cramond's seizures by the medical personnel in the Landstuhl Army Hospital, including negligent follow-up care after the operation and after Mr. Cramond's disability retirement. She also alleged that this negligent treatment and follow-up care proximately caused his seizure in 1975 which resulted in the fall and ensuing death. The claim was denied by the Army Claims Service. The denial was appealed to the Secretary of the Army who, by delegation, affirmed the initial denial and ruled that Mr. Cramond's death was not a proximate result of treatment received or follow-up care by medical personnel at Landstuhl. Subsequently, the claimant submitted the matter to us requesting that we report it to Congress as a meritorious claim.

The Meritorious Claims Act, now 31 U.S.C. § 3702(d), provides as follows:

> The Comptroller General shall report to Congress on a claim against the Government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the Comptroller General believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the Comptroller General.

There is a question of whether this claim was timely presented, but that question need not be resolved because there is a more fundamental difficulty with it. We have consistently construed the Act as applying only to claims of the types which fall within our settlement authority, but which may not be adjusted and settled regardless of the equities involved, because agency appropriations are not available to pay a claim for which the United States is not legally liable. *E.g.,* 34 Comp. Gen. 490 (1955); *Matter of Schwab,* B-203204, July 24, 1981.

Claims against the United States are cognizable by our Office except where settlement authority has been specifically delegated to some other agency. 31 U.S.C. § 3702(a). In this regard, claims for damages against the United States caused by the negligent or wrongful act or omission of a Government employee while acting within the scope of his office or employment are considered and adjusted under the Federal Tort Claims Act, 28 U.S.C. § 2672 (1976), or the Military Claims Act, 10 U.S.C. § 2733 (1976). Under the provisions of both Acts, the head of the particular Federal agency involved or his designee is authorized to consider and settle any tort claim against that agency. Settlements made under those Acts are "final and conclusive." 10 U.S.C. § 2735; 28 U.S.C. § 2672. Therefore, this type of claim is one of those for which settlement authority has been delegated elsewhere, and our Office has no authority to either consider the merits of this claim or review settlements made under those provisions.

Accordingly, since Mrs. Cramond's claim is not within the settlement authority of our Office, it is not appropriate for us to consider it for submission to the Congress as a meritorious claim under the provisions of 31 U.S.C. § 3702(d).

[B-210454]

Officers and Employees—Transfers—Miscellaneous Expenses—Catalytic Converters—Installed in Automobiles—Cost of Reconnecting, etc.

Department of Defense civilian employees participating in a Privately Owned Vehicle Import Control Program may be reimbursed for cost of reinstallation of catalytic converters upon reentry of vehicles into the United States. Cost of securing a bond allowing the vehicle to be admitted to the United States incurred by nonparticipants may also be reimbursed since it is required for those who do not participate in the program. B-163107, May 18, 1973, is distinguished.

Officers and Employees—Transfers—Miscellaneous Expenses—Catalytic Converters—Installed in Automobiles—Cost of Reconnecting, etc.

Members of the uniformed services are reimbursed miscellaneous expenses incurred incident to a permanent change under 37 U.S.C. 407, a set allowance, which does not require an itemization of the expenses. Accordingly, no authority exists for any additional reimbursement of the costs of reconnecting a catalytic converter or the costs of securing a bond to allow the vehicle to be admitted to the United States on return from an overseas assignment.

Matter of: Reimbursement for Cost of Reconnecting Catalytic Converters, March 29, 1983:

This advance decision responds to a request from the Assistant Secretary of the Army (Manpower and Reserve Affairs), concerning whether the cost of reconnecting a catalytic converter on a vehicle for a civilian employee or a member of the uniformed service who is member of the Privately Owned Vehicle (POV) Import Control Program may be reimbursed as a miscellaneous expense incident to relocation on returning to the United States after an overseas assignment. We are also asked whether the cost of securing a bond allowing the entry of the vehicle of an individual not participating in the program may be reimbursed. The matter has been assigned control number 138 by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC).

For the following reasons such reconnection and bond costs may be included as allowable miscellaneous expense items for civilian employees but may not be reimbursed for members of the uniformed services.

The Department of Defense POV Import Control Program was implemented in 1976 with Environmental Protection Agency approval. It is a voluntary program designed to assist Defense personnel assigned overseas to protect catalytic converters on their vehicles from contamination by leaded gasoline, unleaded gasoline

being generally unavailable in foreign assignment areas. Under the program, participants have catalytic converters removed prior to shipment and then reinstalled upon subsequent return to the United States. Pursuant to 40 C.F.R 85.1509, nonparticipants are denied reentry of their vehicles into the United States until they post a cash bond with the Customs Service, equal to the value of the vehicle, pending replacement of the catalytic converter. Such replacement is required if the converter has been contaminated by the use of leaded gasoline overseas.

Under the provisions of 5 U.S.C. 5724a, civilian employees of the Government may be reimbursed certain expenses incurred incident to a relocation within certain limitations. Paragraph C9000, Joint Travel Regulations, Volume 2 (2 JTR), applicable only to civilian employees, provides a miscellaneous expenses allowance "for the purpose of defraying various contingent costs associated with relocation of a residence in connection with an authorized or approved permanent change of station." Item 5 of paragraph C9000, 2 JTR, lists as costs to be reimbursed: "automobile registration, driver's license and use taxes imposed when bringing automobiles into some jurisdictions." A similar provision is contained in the Federal Travel Regulations. It is to be noted that Volume 1 of the Joint Travel Regulations, applicable to military members, contains no analogous provision.

We held in *Matter of Zimmerman,* B-202520, January 4, 1982, that a Defense civilian employee transferred to Germany, a participant in the POV Import Control Program, was not entitled to reimbursement for the cost of removing the catalytic converter prior to shipment because such removal was not a registration related requirement of his new duty station, and was, therefore, not authorized as a miscellaneous expense as enumerated in paragraph C9000. However, we held in *Matter of Grills,* 56 Comp. Gen. 53 (1976), that the cost of installing a pollution control device to comply with mandatory California pollution standards was proper for inclusion as a cost associated with registration of the vehicle at the employee's new duty station for miscellaneous expense allowance purposes.

We believe the cost of reinstalling the catalytic converter when an employee who has disconnected it before using the vehicle abroad is an expense similar to that incurred in *Grills, supra,* since a functioning catalytic converter is necessary for the car to be admitted to the United States, and to be registered in most jurisdictions in the United States. This is distinguishable from the cost of repairing or replacing damaged parts, which we have held may not be included as miscellaneous expenses. See B-163107, May 18, 1973. Accordingly, the cost of reinstalling the catalytic converter of a POV Import Control Program participant upon reentry of the vehicle into the United States may be included in determining miscellaneous expenses reimbursement.

Similarly, the cost of securing a bond for release of the vehicle on return to the United States and insuring that emission standards are met may also be included as a miscellaneous expense. This may be done since it must be provided by those who do not participate in the program in order for their vehicles to be admitted to the United States.

Miscellaneous expenses incurred by members of the uniformed services incident to a relocation are not reimbursable in the same manner as that provided for civilian employees under 5 U.S.C. 5724a. Members of the uniformed services are authorized a dislocation allowance under 37 U.S.C. 407, which is equal to 1 month's basic allowance for quarters as provided for his pay grade and dependency status. This allowance was designed to cover miscellaneous costs incurred incident to a permanent change of station and does not require itemization of the expenses incurred. Accordingly, no authority exists to reimburse members of the uniformed services for the reconnection of the catalytic converter or the cost of securing a bond to allow the vehicle to be admitted to the United States.

[B-210022]

Bids—Mistakes—Correction—Evidence of Error—Sufficiency—Proximity of Asserted Intended Bid to Next Low Bid

The closer an asserted intended bid is to the next low bid, the more difficult it is to clearly establish that the asserted bid is the one actually intended. Where correction would bring the bid within one-tenth of 1 percent of the next low bid, and the intended bid can only be established by resort to an affidavit and an envelope on which the final bid was allegedly calculated just prior to bid opening, the agency's decision not to permit correction is reasonable.

Matter of: American Museum Construction Division of Byer Industries, Inc., March 31, 1983:

American Museum Construction Division of Byer Industries, Inc. (AMC) protests the decision of the Army Corps of Engineers to permit withdrawal but not correction of its bid under invitation for bids (IFB) No. DACA31-82-B-0063 for renovation of a commissary building. We deny the protest.

Bid opening was on August 3, 1982; eight bids were received. The apparent low bid was that of Prince Construction Company in the amount of $349,868. The next low bid was that of AMC in the amount of $353,300. The third and fourth low bids were submitted by C&L Construction Company in the amount of $453,537 (subsequently found to be nonresponsive) and Porter Contracting Company, Inc. in the amount of $454,000. The Government estimate for the work was $428,000.

Because of the disparity between the Government estimate and the bids of Prince and AMC, the contracting officer requested ver-

ification of their bids. Prince alleged a mistake in bid and was permitted to withdraw.

By letter of August 4, 1982, AMC also alleged an error in its bid. The letter stated that the error occurred when AMC's president phoned his office shortly before bid opening to receive last minute subcontractor quotes. In adding these quotes to its bid on a hand-held calculator, he failed to enter "one zero" resulting in a $100,000 mistake in bid.

In a subsequent meeting with agency personnel, AMC again explained that the error occurred while its president was adding subcontractor quotes to its bid during a phone conversation between himself and his office. The nature of the error, however, was described as the failure to enter the number "1" from the figure $120,930 when adding it to the figure $325,570. The total of these figures was thus erroneously calculated as $346,500 rather than the correct sum of $446,500. At this time, AMC stated that the earlier explanation of the mistake as the omission of "one zero" was incorrect, and resulted from its haste to alert the agency that a mistake in bid had been made. It submitted a handwritten draft copy of its August 4 letter to show that, as drafted, the letter described the error as the failure to enter "One—." This was erroneously typed as "One zero" and no one noticed the error before the letter was mailed.

In support of its claim, AMC submitted the work papers used in preparing its bid, as well as an envelope on which its president recorded the subcontractor quotes received by phone and then added them to its previously prepared bid amount. The envelope shows the following entries:

	163,000	Mech.	Hugh.
	75,000	Elec.	M&T.
	49,573	Sprinkler	Capitol.
	7,800	Paint	Shield.
	295,973		
10%	29,597		
	325,570		
	120,930		
	[1]346,500		
Bond etc..	6,800		
	353,300		

[1] Correct amount is $446,500.

In addition, AMC submitted affidavits from its president and his secretary explaining how the error occurred, as well as affidavits

from each subcontractor whose bid was used in computing AMC's bid. The subcontractor bids are also recorded in AMC's worksheets, as is the figure of $120,930 (for work to be performed by AMC itself including profit and overhead). The worksheets contain the $6,800 amount too, which is shown as a total of three figures—$5,100 for bond, $700 for miscellaneous and $1,000 for "dumpster." The worksheets do not show the 10 percent amount added to the subcontractor quotes, nor do they show how the $5,100 amount for bonding was calculated.

Defense Acquisition Regulation (DAR) § 2-406.3(a)(2) (1976 ed.) provides that a bid may be corrected provided that both as corrected and uncorrrected it is low, and the evidence is clear and convincing as to the existence of a mistake and as to the bid actually intended. After examining the documents submitted by AMC in support of its claim, the Army concluded that the evidence was clear and convincing as to the existence of a mistake, but not as to the bid actually intended. Accordingly, AMC was not permitted to correct its bid.

The Army's position is that AMC's intended bid cannot be clearly established because it cannot determine from AMC's worksheets what the 10 percent figure added to the subcontract costs on the envelope represents, or how the bond costs were calculated. The agency also observes that AMC has not requested any increase in its bonding costs even though it has requested an upward correction of its basic bid.

Further, the agency notes that correction of AMC's bid would bring it within one-tenth of 1 percent of the next low bid, a result which the agency concludes would adversely affect the integrity of the competitive bidding system. In a similar vein, several inconsistencies in AMC's statements in support of its claim are noted, such as its original assertion that the mistake resulted from the omission of "one zero" rather than the omission of a one.

AMC contends that its intended bid is clear from its worksheets and the envelope on which its president wrote the subcontractor quotes and added up its total bid. The protester argues that these documents plainly show a mistake in addition which it should be permitted to correct.

AMC explains that the 10 percent figure added to its subcontractor costs represents profit and states that it does not charge overhead on work it does not itself perform. AMC has submitted documentation to demonstrate that this is its normal practice; however, this documentation was not originally submitted to the Army. The protester also asserts that whether the 10 percent figure represents profit, or overhead, or both is irrelevant since it is clearly documented that AMC intended to add that amount to its bid.

Concerning bonding costs, AMC states that its practice is to calculate them by multiplying its estimate of the total contract price by 1.2 percent. The result is then used to calculate AMC's bid. The

protester explains that it estimates these costs in order to save time since subcontractor quotes are frequently not received until shortly before bid opening.

Since the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency, and because the weight to be given the evidence in support of an asserted mistake is a question of fact, we will not disturb an agency's determination concerning bid correction unless there is no reasonable basis for such determination. *Sentinel Electronics Inc.,* B-194209, August 24, 1979, 79-2 CPD 150. Here, we find a reasonable basis for the agency's decision.

The mistake-in-bid rules are intended to permit relief to bidders who make genuine mistakes in their bids; the paramount concern of the rules, however, is the protection of the competitive bidding system. *Panoramic Studios,* B-200664, August 17, 1981, 81-2 CPD 144. It has been argued that bid correction after bid opening and the disclosure of prices compromise the integrity of the system, which to some extent, at least, is true. *P.K. Contractors, Inc.,* B-205482, April 22, 1982, 82-1 CPD 368. Nonetheless, the potential for abuse flowing from a decision to allow correction is protected against by the high standard proof necessary before correction is permitted. *Id.*

Thus, the closer an asserted intended bid is to the next low bid, the more difficult it is to clearly establish that it is the bid actually intended, and for that reason, correction is often disallowed when a corrected bid would come too close to the next low bid. *R. H. Whelan Co.,* B-203248, August 11, 1981, 81-2 CPD 123. Here, we are faced with just such a case—the correction of AMC's bid would bring it within less than one-tenth of 1 percent of the next low bid.

AMC's intended bid cannot be ascertained from its worksheets since they neither show how it calculated its bonding costs nor contain the 10 percent figure which AMC says it adds to subcontractor costs for profit. Instead, resort must be made to an envelope on which AMC's president allegedly calculated its final bid just prior to bid opening, and to the president's affidavit which explains how AMC calculated these amounts.

Without questioning the truth of either of these documents, we do not think they meet the very high standard of proof required for bid correction in a case such as this. Where, as here, the amount of the alleged error is substantial, and the difference between the corrected bid and the next low bid is small, to accept such evidence to establish the intended bid would adversely affect the integrity of the competitive bidding system. See *Fortec Constructors,* B-203190.2, September 29, 1981, 81-2 CPD 264. Further, we agree with the agency's conclusion that permitting correction of AMC's bid after AMC changed its explanation of the nature of the error would undermine public confidence in the competitive system, regardless of the reason for AMC's changed position. Therefore, we

conclude that the Army acted reasonably when it denied correction of AMC's bid.

The protest is denied.

[B-207665]

Transportation—Household Effects—House Trailer Shipments, etc.—Reimbursement—Ownership at Time of Transportation Requirment

Although it is held that a boat may qualify as a mobile dwelling under 5 U.S.C. 5724(b), an employee who purchased a sailboat to be occupied as his residence incident to permanent change of station is not entitled to freight charges in transporting the boat from the place of construction to the delivery site where it was launched since the employee was not the owner of the boat at the time it was transported.

Transportation—Household Effects—House Trailer Shipments, etc.—Purchase Costs

Employee may be reimbursed, in connection with the purchase of a sailboat to be occupied as a residence upon transfer of station, those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the operation of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2-3.1b.

Matter of: Adam W. Mink, April 1, 1983:

The Accounting and Finance Officer, Defense Mapping Agency, requests our decision on whether a transferred employee may be reimbursed for freight and commissioning expenses incurred in the purchase of a boat used as his residence at his new duty station. Payment of freight from place of construction to delivery location is not authorized since the boat was not owned by the employee at the time it was transported, but expenses incident to the launching of the boat and for adjustments necessary in the boat's electrical system may be reimbursed as part of the miscellaneous expenses allowance.

Mr. Adam W. Mink, an employee of the Defense Mapping Agency, was transferred from St. Louis, Missouri, to Washington, D.C. In connection with his permanent change-of-station move, he purchased a sailboat to be used as his residence at his new duty station. His claim for reimbursement of expenses incurred incident to purchase of that residence includes a $4,500 freight charge for transportation from California, the place of construction, to the delivery site in Annapolis, Maryland, and $1,050 in commissioning expenses. A contract for purchase of the boat was entered into in April 1981. This contract provided that the settlement date would be on or before the date the boat arrived in Annapolis and that full payment was due at that time. The contract also provided that title would pass upon receipt by the seller of all payments due. This occurred on July 15, 1981, and from the facts given we must assume that transportation of the boat had been completed or virtually completed at that time. The commissioning expenses charged by the seller of the boat include the following:

(1) Rigging (lift mast and set-labor plus charges)	$100.00
(2) Labor on engine	130.00

(3) Labor on electrical system	160.00
(4) Shaft alignment and propeller	80.00
(5) Parts for engine	120.00
(6) Blocking fee (jack stands support to work on boat)	150.00
(7) Crane charges—$80 hr. (stepping mast)	160.00
(8) Travel lift fee (pick up boat and put in water)	150.00
Total	$1,050.00

The certifying officer asks whether the freight and commissioning charges may be reimbursed as real estate or miscellaneous expenses.

Under 5 U.S.C. 5724a(a)(4) a transferred employee may be reimbursed customary and reasonable expenses required to be paid by him in connection with the purchase of a residence at his new duty station. Because neither the statute nor regulation limits the qualifying residence to a dwelling on land, we have recognized that expenses which would be reimbursed in connection with the purchase of a residence on land may be reimbursed in connection with the purchase of a houseboat which is occupied as a residence upon transfer of station. Thus, in 53 Comp. Gen. 626 (1974) we authorized reimbursement for the cost of a marine survey incurred in connection with the purchase of a houseboat. Like certain inspection costs that may be reimbursed incident to the purchase of a dwelling on land, the marine survey fee was incurred as a necessary condition to financing the purchase of the residence. See, e.g., B-194887, August 17, 1979. However, neither the transportation charges nor the commissioning expenses claimed by Mr. Mink are analogous to charges incurred incident to the purchase of a dwelling on land. Accordingly they may not be reimbursed as real estate transaction expenses under subsection 5724a(a)(4).

We recognize that similar transportation charges are incurred in transporting a mobile home to a transferred employee's new duty station. In the case of a mobile home used as a residence, an employee may be entitled to reimbursement for such transportation charges under 5 U.S.C. 5724(b). That section provides that in lieu of and limited to the amount otherwise reimbursable for transportation of household goods, an employee who transports a housetrailer or mobile home for use as a residence may be reimbursed commercial transportation charges or a mileage allowance. For the purpose of that statute, a mobile home is defined as "all types of house trailers or mobile dwellings constructed for use as residences and designed to be moved overland, either being self propelled or towed." Paragraph 2-1.4g of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973 as amended). Based on a review of the applicable statutes, we held in 48 Comp. Gen. 147 (1968) that the Department of Defense regulations governing payment of a trailer al-

lowance for military personnel could not be amended to authorize movement of a boat incident to a permanent change of station, even though the boat is actually used as a residence. Although addressed specifically to the transfer entitlements of military personnel, that decision points out that 5 U.S.C. 5724(b) applicable to civilian employees is patterned after and subject to the same construction as the trailer allowance provisions of title 37 of the United States Code. Under that rule payment of the transportation expenses involved could not be allowed.

In decision 62 Comp. Gen. 292, dated today, however, we have determined that the cost of moving a boat for use as an employee's or service member's dwelling at his new duty station may be authorized under the controlling provisions of statute. Accordingly, we have authorized the Department of Defense and the General Services Administration (because of the similarity of 5 U.S.C. 5724(b) relating to civilian employees) to clarify the Joint Travel Regulations and the Federal Travel Regulations, respectively, to provide specifically for paying appropriate costs connected with the transportation of a boat when it will be used as a residence at the employee's or service member's new duty station.

This decision represents a substantial departure from our previous interpretation of the Federal Travel Regulations. Given the reliance placed upon our prior interpretation and the extent to which retrospectivity would be disruptive of settled claims, the rule set forth above will be prospective only. Claims settled prior to date of this decision should not be reopened.

In the instant case, however, we are unable to authorize payment based on the new rule because it appears from the facts given that the boat was not the property of the employee at the time it was shipped. See paragraphs C8002-1a and C10002-5a, Volume 2, Joint Travel Regulations. B-146033, June 22, 1961. It is also noted that the file does not show that Mr. Mink did not ship household goods at Government expense, a condition precedent to payment for mobile home transportation. 5 U.S.C. 5724(b).

An employee transferred in the interest of the Government is entitled to a miscellaneous expenses allowance under 5 U.S.C. 5724a(b). For an employee with immediate family, the implementing Federal Travel Regulations (FPMR 101-7) (May 1973) at chapter 2, Part 3, provide for the reimbursement of such expenses in an amount up to 2 weeks' basic pay upon evidence that he incurred costs covered by the miscellaneous expense allowance. Paragraph 2-3.1b lists the types of costs covered and provides in pertinent part as follows:

b. *Types of costs covered.* The allowance is related to expenses that are common to living quarters, furnishings, household appliances, and to other general types of costs inherent in relocation of a place of residence. The types of costs intended to be reimbursed under the allowance include but are not limited to the following:

(1) Fees for disconnecting and connecting appliances, equipment, and utilities involved in relocation and costs of converting appliances for operation on available utilities;
(2) Fees for unblocking and blocking and related expenses in connection with relocating a mobile home * * *.

Like real estate expenses the miscellaneous expenses incurred by Mr. Mink in relocating his boat may be reimbursed to the extent they are analogous to costs that would be reimbursed as miscellaneous expenses incident to the relocation of a mobile home or other residence. See 53 Comp. Gen. 626, *supra.*

Commissioning expense items 1, 4 and 7 are costs incurred primarily to make the boat operable as a sailing vessel. They are not in the nature of those costs that are inherent in the relocation of a residence and, accordingly, may not be reimbursed as miscellaneous expenses. Although items 2, 3 and 6 are expenditures similarly related to the boat's use as a vessel, they are costs necessary to the functioning of the electrical system and to the operation of appliances while the boat is docked for use as residence. Though peculiar to the type of residence here involved, these expenses may be reimbursed as analogous to the cost of connecting appliances and utilities involved in the relocation. Since the cost of replacement or new part necessary to normal operation and maintenance may not be reimbursed as an item of miscellaneous expenses, the cost of engine parts, item number 5, is disallowed. See, e.g., B-163107, May 18, 1973. Item 8 in the amount of $150 is an expenditure necessary in launching the boat. It is similar in purpose to the type of cost involved in setting up a mobile home at a new location and may be reimbursed. *Matter of Larsen,* B-186711, January 31, 1978.

Payment may be made in accordance with this decision.

[B-209591]

Transportation—Household Effects—Military Personnel—Trailer Shipment—Residence Use Requirement

Transferred member of the Air Force may be reimbursed the cost of transporting the houseboat he uses as his dwelling under 37 U.S.C. 409, which permits the transportation at Government expense of a mobile home dwelling, because it is determined that a boat may qualify as a "mobile home dwelling" under the law. 48 Comp. Gen. 147 is overruled and regulations issued to implement that decision need not be applied so as to exclude payment for transporting boats which are used as residences.

Matter of: Lieutenant Christopher J. Donovan, USAF, April 1, 1983:

The question in this case is whether Lieutenant Christopher J. Donovan, USAF, may be reimbursed the cost of transporting the houseboat he has used as his dwelling and intends to continue to use as his dwelling after his transfer. Because we determine in this decision that a boat may qualify as a "mobile home dwelling"

within the meaning of 37 U.S.C. § 409 (Supp. IV, 1980) the claim for transportation costs is for allowance.

The accounting and finance officer at Headquarters, 354th Tactical Fighter Wing (TAC), Myrtle Beach Air Force Base, South Carolina, presented the question, which was assigned control number 82-26 by the Per Diem, Travel and Transportation Allowance Committee.

In August 1982 Lieutenant Donovan received orders transferring him from Myrtle Beach, South Carolina, to Washington, D.C., effective in November. He requested that his houseboat be moved at Government expense under 37 U.S.C. § 409. Since a prior decision of the Comptroller General (48 Comp. Gen. 147 (1968)) held that a houseboat did not qualify as a "mobile dwelling" under section 409, the accounting and finance officer transmitted his request here for an advance decision.

Lieutenant Donovan argues that his houseboat fits within the definition of a "mobile home" in Volume 1 of the Joint Travel Regulations and that he, therefore, is entitled to transportation expenses in accordance with chapter 10 of those regulations. He states that it can be moved overland, noting that there are a number of companies that routinely move large houseboats in the same manner that large house trailers are moved and at approximately the same cost. He also states that houseboat living in a marina has become a common and viable form of homeownership which does not differ significantly from living in a trailer park. The accounting and finance officer suggests that there may have been developments or changes since the Comptroller General's 1968 decision that would warrant reconsideration of that holding.

At the time of the Comptroller General's decision at 48 Comp. Gen. 147 (1968), 37 U.S.C. § 409 authorized a transferred member to transport a "house trailer" or "mobile dwelling" within the United States for use as a residence in lieu of transportation of baggage and household effects or payment of dislocation allowance. Payment for the transportation of a "mobile dwelling" was limited by a statutory maximum mileage rate. The decision noted that Congress had increased the statutory maximum mileage rate over the years in order to reflect the rate increases published in tariffs filed with the Interstate Commerce Commission (ICC) by motor carriers for movement of "house trailers." The decision also stated that the ICC rates upon which the statutory maximum rate was based did not apply to boats, including houseboats, and concluded that since reimbursement was on a mileage basis, the statute "contemplates overland travel." In that decision we held that the term "mobile dwelling" referred to those "* * * designed to be moved overland, either by being self-propelled or towed * * *" and, therefore, did not include a boat or houseboat.

However, we believe that 48 Comp. Gen. 147 may be unduly restrictive. Four years after that decision the Comptroller General

held that a privately owned Pullman rail car converted for use as a residence would qualify as a mobile dwelling for the purpose of section 409 since there was nothing in section 409 or the legislative history of the statutes from which it was derived to indicate any intent that the section was not to be applicable to a mobile dwelling transported by rail. 51 Comp. Gen. 806, 809 (1972). We did not consider it critical that the ICC rates used to establish the mileage rates under section 409 did not apply to Pullman cars or that Congress never specifically considered rail cars as mobile dwellings in its deliberations.

In 1980 Congress amended section 409 to provide for transportation of a "mobile home dwelling" and to limit reimbursement for transportation on the basis of the cost of baggage and household goods transportation, rather than on a mileage basis. Pub. L. No. 96-342, 94 Stat. 1096. Given these changes, we are of the view that the term "mobile home dwelling" as used in section 409 includes a boat.

Regarding the definition of "mobile home" in Appendix J to Volume 1 of the Joint Travel Regulations, we recognize that the phrase "designed to be moved overland" was included to implement the decision in 48 Comp. Gen. 147 which is overruled by this decision. Although that phrase would appear to exclude movement of boats, which are designed to be moved in the water, we do not find that the regulation need be so restrictively interpreted in these circumstances. The law has been changed and our view of the transportation of boats thereunder has changed. No useful purpose would be served by an interpretation of the regulations which would prevent implementation of the newly authorized benefit. We suggest, however, that the definition of "mobile home" be clarified to reflect more specifically this interpretation. As to the Federal Travel Regulations (FPMR 101-7), see our decision 62 Comp. Gen. 289 of today.

This decision represents a substantial departure from our previous interpretation of the Joint Travel Regulations. Given the reliance placed upon our prior interpretation and the extent to which retrospectivity would be disruptive of settled claims, the rule set forth above will be prospective only. Claims settled prior to the date of this decision should not be reopened. See *Matter of Lay,* 56 Comp. Gen. 561 (1977).

Accordingly, Lieutenant Donovan's claim may be allowed if otherwise proper.

[B-208855]

Medical Treatment—Officers and Employees—Travel Expenses—Limitations—Administrative Discretion

An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States

medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed.

Matter of: Travel Expenses Arising from Employee's Fitness for Duty Examination, April 5, 1983:

The issue in this decision is whether travel expenses are payable to a Government employee who chooses to have a "fitness for duty" medical examination performed by a private physician located some distance from his official duty station, despite the availability of a United States medical officer at his station. We hold that a Federal employee who travels to a place within a reasonable distance from his duty station in order to have a fitness for duty examination performed by a private physician is entitled to reimbursement for his resulting travel expenses.

This decision is in response to a request from Mr. Frank X. Hamel, a civilian personnel officer with the Defense Logistics Agency (DLA) in Tracy, California. According to the submission, Federal agency officials may require an employee to submit to an appropriate "fitness for duty" examination when questions arise concerning his physical or mental ability to continue work in his assigned position. Where the agency prescribes that an employee submit to such an examination, it must give that employee the option of being examined either at a Government facility, if one is reasonably available, or by a private physician of the employee's own choosing.

A question has now arisen concerning the use of appropriated funds to pay the travel expenses, including mileage and per diem, of a Government employee who chooses to travel some distance from his duty station to have his examination performed by a private physician, rather than allowing a Government medical officer to examine him at a facility near his place of employment. If such travel expenses may be reimbursed, the officer asks whether the agency would then be required to impose a reasonable limitation on the distance traveled for which reimbursement may be provided.

A Federal agency has authority to direct an employee to submit to a "fitness for duty" examination when questions arise concerning his mental or physical capacity to continue working in his assigned position. *Yates* v. *United States,* 220 Ct. Cl. 669, 670 (1979). See also Federal Personnel Manual (FPM) Supplement 752-1, Subchapter S1-3a(5). Chapter 339 of the FPM, Subchapter 1-3(c), further provides as follows:

* * * Normally, a Federal medical officer should conduct the fitness-for-duty examination. If, however, the employee refuses to be examined by a Federal medical officer or other agency-designed physician, the examination may be conducted by a physician of the employee's choice, subject to the following conditions: (1) the agency determines that the medical examination is necessary primarily for the benefit of

the Government; (2) the physician is board-certified in the appropriate medical specialty, and acceptable to the agency; and (3) the physician submits a complete report of the examination directly to the agency. When an agency obtains a fitness-for-duty medical examination, *whether by a Federal medical officer or an employee-designated physician, there must be no cost to the employee* or the Civil Service Commission. The Comptroller General has ruled that agencies have authority to pay for such medical examinations which are made by employee-designated physicians under the above conditions. [Italic supplied.]

We have consistently held that an agency may use appropriated funds to pay for physical examinations of its employees when those examinations are primarily for the benefit of the Government rather than for the benefit of the employees concerned. 49 Comp. Gen. 794 (1970); 41 *id.* 531 (1962). We have also held that employees may be granted administrative leave for reasonable amounts of time required to undergo such examinations. 44 Comp. Gen. 333 (1964). Finally, as we stated in *Gus C. Ford,* B-188012, May 10, 1977:

> [o]ur Office has also allowed travel expenses and per diem when travel is required in connection with an employee's physical examination but only where the examination is necessary in connection with the employee's position (fitness for duty) and where it is primarily for the benefit of the Government. * * *

See also 49 Comp. Gen. 794, above. Thus, we have based our allowance of travel expenses in these cases on the same criteria as those governing payment for the physical examinations themselves: necessity and Government benefit.

In these cases, we have not attempted to draw any distinction between travel to the office of a United States medical officer and travel to the office of a private physician. Nor do we believe that such a distinction should now be made. Where a physical examination is necessary and for the Government's benefit, we believe that an employee is entitled to reimbursement for reasonable incidental travel expenses.

Under FPM Chapter 339, Subchapter 1-3(c), an employee who is required to undergo a fitness for duty examination as a condition of continued employment may choose to be examined either by a Federal medical officer or by a private physician of his own choice, who has been found to be acceptable to the agency concerned. In addition, the regulation states that when the agency requires such a fitness for duty examination, there must be no cost to the employee, regardless of whether the examination is performed by a Federal medical officer or by an employee-designated physician. We believe that this provision requires that an agency pay not only for the cost of the fitness for duty examination itself, but for all costs directly relating to the examination, including any incidental travel expenses incurred by the employee. Furthermore, these costs must be paid by the agency whether or not the employee consents to be examined by a Federal medical official. If the employee is to be given a meaningful choice to be examined by a private physician, as Subchapter 1-3(c) of FPM Chapter 339 provides, we believe that he must not be penalized for exercising that option by being

required to pay his own travel expenses in such a case. Therefore, we hold that travel expenses may be paid both to employees traveling to Federal medical facilities, and to those traveling to the offices of selected private physicians for their fitness for duty examinations.

We recognize that paying travel expenses to the location of employee-designated physicians should be subject to some limitations. In this regard, an agency may use its administrative discretion to impose reasonable limitations on the distance traveled for which employees may be reimbursed. In doing so, the agency should give consideration to the availability and proximity of appropriate medical facilities and personnel, and the methods of transportation to be used by its employees en route to such facilities. See, for example, the 25-mile limitation on travel for treatment of work-related injuries provided in 20 C.F.R. § 10.402(b) (1982).

Accordingly, with the qualifications stated above, travel expenses may be paid to an employee who chooses to have a fitness for duty examination performed by a private physician located away from his official duty station.

[B-209196, B-208925.2]

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Brooks Bill Applicability—Procurement Not Restricted to A-E Firms—Administrative Determination

General Accounting Office will not question a contracting agency's determination to secure services through competitive bidding procedures rather than through the procedures prescribed in the Brooks Act for the selection of architectural or engineering firms unless the protester demonstrates that the agency clearly intended to circumvent the Act.

Matter of: Association of Soil and Foundation Engineers, April 5, 1983:

The Association of Soil and Foundation Engineers (ASFE) protests use of standard competitive procedures under invitation for bids (IFB) No. FWS 6-82-046 issued by the Department of the Interior. ASFE additionally requests that we reconsider our decision *Association of Soil and Foundation Engineers,* B-208925, January 4, 1983, 83-1 CPD 8, in which we denied its protest under IFB No. K5120136, also issued by the Department of the Interior. ASFE contends that the services under both solicitations should have been secured through the special procedures prescribed in the Brooks Act, 40 U.S.C. § 541 *et seq.* (1976), for the procurement of architectural and engineering (A-E) services. The Brooks Act declares it to be Federal policy to issue public announcements of all requirements for A-E services and to negotiate contracts for the services on the basis of demonstrated competence and qualifications; the procedures do not include price competition. We deny the

protest against solicitation FWS 6-82-046 and affirm our prior decision concerning solicitation KS120136.

Solicitation No. FWS 6-82-046 calls for the drilling of soil samples, the classification and laboratory analysis of the soil samples, and the submission of a report which details the results of the testing and recommends construction methods and foundation design for various structures and facilities at the Leadville Fish Hatchery, Leadville, Colorado. The preponderance of the contract work described in the solicitation involves the drilling, collection and laboratory analysis of soil samples which ASFE agrees do not constitute professional A-E services under the Brooks Act. Although professional A-E firms often perform these services, they are not unique to A-E firms. Rather, ASFE contends that the Brooks Act applies to the procurement essentially because the solicitation requires to be included in the report, in addition to test results and findings,

> * * * recommendations for the type of foundations (piling, spread footings, etc.), site drainage recommendations, method of construction including soil bearing capacities and settlement predictions for the structure proposed.

In ASFE's view this aspect of the procurement is A-E in nature and, therefore, Brooks Act procedures should have been used to procure all the services contemplated by the solicitation.

Solicitation K5120136 uses standard competitive procedures to secure soil boring sampling and testing needed to provide the State of Ohio with recommendations about stabilizing a site known as the Weidemeyer earthslip. The majority of the contract work involves drilling, installation of piezometers and collecting soil and rock samples. Again, ASFE concedes that these efforts do not constitute professional A-E services under the Brooks Act, but asserts that those services may logically and justifiably be performed by an A-E firm. ASFE argues that the Brooks Act applies to the procurement because the solicitation also requires the contractor to submit,

> * * * an engineering report which includes recommendations for priority repairs, recommendations for design load cases, and recommendations for soil design parameters for the various soil stratas encountered.

Again ASFE asserts these are A-E services and that the noncompetitive procedures should have been used.

Even if we accept ASFE's assertion that recommending types of foundations and methods of construction constitute engineering services, we do not agree with ASFE that it follows as a matter of logical necessity that Brooks Act procedures had to be used in the procurements. The reason is that the Brooks Act does not require that contracts be awarded to A-E firms merely because architects or engineers might do part of the contract work. See *Association of Soil and Foundation Engineers—Reconsideration,* 61 Comp. Gen. 377 (1982), 82-1 CPD 429. Rather, the Act's procedures, and the re-

striction to A-E firms attached to them, apply to the procurement of services which uniquely or to a substantial or dominant extent require performance by a professionally licensed and qualified A-E firm. *Ninneman Engineering—Reconsideration,* B-184770, March 9, 1977, 77-1 CPD 171.

The application of this standard is in certain cases not a matter of great difficulty and the applicability or nonapplicability of Brooks Act procedures is clear. For example, design and consultation services secured in connection with a Federal construction project clearly are required to be performed by an A-E firm [1] and Brooks Act procedures must be used.[2] See *Ninneman Engineering—Reconsideration, supra.* Similarly, preliminary road location surveying is not uniquely or to a dominant extent required to be performed by an A-E firm and the service must be procured competitively. *Timberland-McCullough, Inc.,* B-208086, September 24, 1982, 82-2 CPD 273.

Between these clear cases the statutory requirement to utilize non-competitive precedures to procure A-E services [3] becomes difficult to apply, resulting in our continuing attempt, through the bid protest process, to draw fine distinctions and to provide guidelines to the agencies as to the application of the Brooks Act to particular contracts. Of necessity, these determinations are based on the nature and circumstances of the work to be done and the needs of the contracting agency. Such determinations are the responsibility of the contracting agency, not our Office and, therefore, we have recognized broad discretion on the part of the agency in making such determinations. *See Association of Soil and Foundation Engineers,* B-204634, February 2, 1982, 82-1 CPD 77. We think that under the circumstances the proper role of this Office in these cases is to defer to the judgment of the agency unless the agency's conclusions are so egregious as to demonstrate a clear intent either to circumvent the Act or to employ the noncompetitive procedures enunciated by the Act to secure services that should properly be solicited by competitive means.

Although ASFE vehemently disagrees with Interior on both contracts, the record does not establish that Interior's conclusions are so erroneous as to warrant a conclusion that it intended to circumvent the Brooks Act. We affirm our initial decision concerning solicitation No. KS120136 and deny the protest on solicitation No. FWS 6-82-046.

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[1] This is consistent with the stated purpose of the Brooks Act, that is, "to establish a Federal policy for the selection of qualified architects and engineers to design and provide consultant services in carrying out Federal construction and related programs." S. Rep. No. 1219, 92d Congress, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4767. The rationale for the policy is that the quality of these services is basic and essential to the quality of construction, yet their cost generally represents a very small part of the total cost of construction. The act itself is not limited to construction.

[2] The Brooks Act requires negotiation on the basis of demonstrated competence and qualification for the type of professional services required, that is, without price competition, but at fair and reasonable prices. 40 U.S.C. 542. Costs will be kept under control by the 6 percent fee limitation prescribed by 41 U.S.C. 254(b). S. Rep. No. 1219, *supra* note 1, at 4772. The 6 percent fee limitation concerns A-E contracts relating to any public works or utility project, that is, projects concerning construction. 17 Comp. Gen. 545 (1938).

[3] The Act defines A-E services only as those professional services of an architectural and engineering nature as well as those incidental services that members of these professions and those in their employ may logically or justifiably perform. 40 U.S.C. 541(3).

[B-209433]

Contracts—Small Business Concerns—Awards—Self-Certification—Indication of Error—Contracting Officer's Duty To Investigate, etc.

While contracting officer and Small Business Administration considered timely size protest contained insufficient detail, contracting officer should have pursued matter on his own initiative under Defense Acquisition Regulation 1-703(b)(2) where data submitted by proposed awardee in bid indicated $5 million size standard may be exceeded.

Matter of: Foam-Flex Inc., April 12, 1983:

Foam-Flex Inc. (FFI) protests a contracting officer's refusal to consider FFI's protest against F.J. Dahill Company's (Dahill) size status for the purposes of the present procurement. The contract is for roofing work to be performed at the Bradley Air National Guard Base, East Granby, Connecticut, and was awarded to Dahill under invitation for bids (IFB) No. DAHA06-82-B-0010, a small business set-aside issued by the United States Property and Fiscal Office for Connecticut (USPFO-CT). The contracting officer was of the opinion that a letter submitted by FFI did not constitute a protest of Dahill's size status since it did not contain sufficient evidence in support of FFI's claim.

We sustain the protest.

Three bids were opened on September 24, 1982. Dahill was the low bidder. Shortly thereafter, FFI questioned the contracting officer concerning the eligibility of Dahill as a small business under the $5 million average 3-year annual receipts size standard set forth in the IFB. In response to FFI's inquiry, the contracting officer reviewed Dahill's bid to determine whether Dahill had certified itself as a small business and also allegedly contacted the Small Business Administration's (SBA) regional office to verify the applicable small business size standard. The SBA regional office reportedly informed the contracting officer that the applicable size standard was $9.5 million average annual receipts. (We note that the SBA regional office later denied that it had given this information.) FFI was advised of this fact and was also informed by the contracting officer that if the award was delayed, funds for the project would be lost. Based upon this conversation FFI declined to institute a formal protest at that time.

On September 29, 1982, however, FFI discussed the matter with the SBA and was told that the size standard was actually $5 million. FFI then decided to file a protest and a letter was delivered to the contracting office on September 29, 1982. The letter indicated that in FFI's opinion Dahill did not qualify as a small business since it exceeded the guidelines set forth in the IFB. Under Defense Acquisition Regulation (DAR) § 1-703(b)(1) (Defense Acquisition Circular (DAC) No. 76-19, July 27, 1979), the protest was timely since it was filed within the 5-day time period provided.

The contracting officer reviewed the letter sent by FFI and determined that it did not comply with the requirements of DAR § 1-703(b)(1) since it did not contain sufficient evidence to support FFI's allegation. Due to this deficiency, it was determined that the letter was not a "protest" and as a result, the contracting officer did not then forward the matter to the SBA. The contract award proceeded as originally planned and Dahill was awarded the contract on September 30, 1982. Subsequently, the protest was sent to SBA as an after award protest for a prospective size determination. SBA declined to consider the matter because SBA considered the protest to be nonspecific.

Generally, in the absence of information prior to award that would reasonably impeach a bidder's self-certification or a timely size protest, a contracting officer may accept a small business size certification at face value. *Keco Industries, Inc.,* 56 Comp. Gen. 878 (1977), 77-2 CPD 98; *Eller & Company, Inc.,* B-191986, June 16, 1978, 78-1 CPD 441. The self-certification mechanism was adopted as a practical solution with the knowledge that case-by-case investigation of size status would be extremely expensive and time consuming and with the understanding that small business concerns in a particular industry are in the best position to know the size status of their competitors. B-168933, April 3, 1970.

In this instance, FFI relied on its knowledge of the contractors in the area and of the roofing business in general in contesting Dahill's eligibility as a small business concern. Even though we recognize that FFI could possibly have furnished additional information about Dahill, we find the specifics of the protest not to be the major concern here. Rather, we find the contracting officer's response to the evidence submitted by FFI was inadequate. A cursory examination by the contracting officer of the Construction Contractor Experience Data, accompanying Dahill's bid, would have indicated that Dahill listed receipts during the previous 3 years in excess of the $5 million size standard set out in the IFB. Although there appears to have been some confusion as to the exact standard to be applied, there is no evidence in the record that the contracting officer ever reviewed the sales data submitted by Dahill in order to determine whether Dahill would have qualified under either the $5 million or $9.5 million size standard. If this action had been taken, the contracting officer, who had the relevant information rather than FFI, could have filed his own size protest. *See* DAR § 1-703(b)(2) (DAC No. 76-19, July 27, 1979).

Accordingly, we sustain the protest. However, since the contract has been substantially completed, no remedial relief is available in this case.

[B-207626]

Pay—Retired—Survivor Benefit Plan—Children—Dependency Status—Mental Incapacity During School Year

Under the Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suffered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 44 Comp. Gen. 551 is modified in part.

Pay—Retired—Survivor Benefit Plan—Beneficiary Payments—Suspension and Reinstatement—Mentally Incapacitated Beneficiaries' Employment

A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the following period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military survivor annuity plans do not preclude reinstatement in appropriate circumstances.

Releases—Proper Release or Acquittance—Survivor Benefit Plan Annuitant—Mentally Incapacitated Adult

It is necessary that a good acquittance be obtained when payments are made to persons under Federal law. When amounts due a minor are involved, a good acquittance results through payment to the minor's natural guardian without formal court appointment, provided that the laws of the State of domicile authorize that procedure as a means of obtaining acquittance. However, payments may not be made to one claiming to act as natural guardian and custodian of a payee, when the payee is in fact an adult suffering from mental illness.

Agents—Of Private Parties—Authority—Vitiated—Mental Incapacity of Principal

Under the rules of agency, a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. Hence, Survivor Benefit Plan annuity payments may not be made to an agent designated in a power of attorney which was signed by an annuitant known to be suffering from mental illness but not adjudged incompetent, since in the circumstances the validity of the power of attorney is too doubtful to serve as a proper basis for a payment from appropriated funds.

Pay—Retired—Survivor Benefit Plan—Beneficiary Payments—Mentally Incapacitated Beneficiaries—Effect of Incapacity on Payments

Survivor Benefit Plan annuity payments in the case of an adult beneficiary known to be suffering from mental illness, but not adjudged incompetent, may be made directly to the beneficiary if by psychiatric opinion the beneficiary is considered sufficiently competent to manage the amounts due and to use the annuity properly for personal maintenance. Otherwise, the amounts due should remain unpaid and credited on account until a guardian authorized to receive payment is appointed by a court.

Matter of: Survivor Benefit Plan—Incapacitated Annuitants, April 13, 1983:

Background

This action is in response to a request for an advance decision from an accounting and finance officer of the United States Air Force concerning the propriety of approving a voucher in the amount of $13,676.56 in favor of Laura J. (last name omitted). The voucher covers Survivor Benefit Plan annuity payments due her for the period from January 1, 1978, through December 31, 1981, if it may properly be concluded that during that time she was a "dependent child" incapable of self-support because of mental illness. The request was assigned submission number DO-AF-1397 by the Department of Defense Military Pay and Allowance Committee.

We conclude that the annuity payments in question may properly be approved, subject to certain conditions and limitations.

Laura J. was born in August 1956, and she entered college as a full-time student in the fall of 1974 when she was 18 years old. In August 1975, during the summer vacation following the completion of her freshman year at college, she suffered a mental breakdown and was hospitalized for 3 months. She returned to college as a part-time student in January 1976 while continuing to receive outpatient psychiatric care. However, recurring debilitating episodes of mental illness requiring rehospitalization repeatedly interrupted her attendance at school, and eventually in January 1980 she discontinued her studies completely without having finished the sophomore year of college. In July 1980 she secured full-time employment in a retail store but was discharged after 3 weeks because of erratic behavior. Shortly thereafter her condition worsened to the extent that hospitalization was again required. In July 1981, following her recovery, she obtained full-time employment as an office clerk on a 6-month probationary basis. Her employment was terminated at the end of that 6-month period because the behavioral symptoms of her illness had begun to recur. Her condition continued to deteriorate until hospitalization was again required in February 1982. The attending psychiatrists have diagnosed her condition as "severe affective illness" manifested by anxiety and depression, and by periods of complete inability to function except to satisfy "her basic needs for rest and eating." At times the psychiatrists have been "guardedly positive" about her prognosis and have expressed the opinion that she had recovered to the point of being capable of self-support. At other times they have been less optimistic, and have expressed the opinion that she was not only incapable of self-support but also unable "to function even at marginal levels during periods as an out-patient."

Laura's father was a retired military officer. In December 1972 he elected to participate in the Survivor Benefit Plan with spouse

and dependent child coverage. He died shortly thereafter, and the Air Force commenced payment of an annuity under the Plan to his widow, i.e., to Laura's mother. The mother's entitlement to the annuity ended in January 1978 when she remarried. Uncertainty then arose concerning Laura's eligibility to succeed to the annuity under 10 U.S.C. 1450 as the officer's "dependent child" on the basis of her mental illness. Three specific questions about the matter are presented in the submission.

Eligibility To Receive Annuity

The first question is:

a. Is Laura eligible to receive a Survivor Benefit Plan annuity, based on the illness that occurred during the summer break of 1975 after she completed the spring 1975 semester, even though she was not attending school at the time the illness occurred?

The Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, is an income maintenance program for the dependents of deceased service members. Eligible beneficiaries include a member's "dependent child." That term is defined by 10 U.S.C. 1447(5)(B), insofar as is here pertinent, as a person who is:

> • • • incapable of supporting himself because of a mental or physical incapacity existing before his eighteenth birthday or incurred on or after that birthday, but before his twenty-second birthday, while pursuing • • • a full-time course of study or training; • • •
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> • • • • • • •
>
> • • • A child who is a student is considered not to have ceased to be a student during an interim between school years if the interim is not more than 150 days and if he shows to the satisfaction of the Secretary of Defense that he has a bona fide intention of continuing to pursue a course of study or training in the same or a different school during the school semester (or other period into which the school year is divided) immediately after the interim. • • •

Implementing regulations issued by the Secretary of Defense are contained in paragraph 102.i. of Department of Defense Directive 1332.27 (Encl 1), which states:

> • • • Students will continue to be considered as such during the interims between school years but not for periods longer than 150 days. Students must provide bona fide evidence of intent to continue study or training in the same or a different school during the school semester or other period into which the school year is divided. • • •

In the present case, evidence has been furnished in the form of school records and medical statements verifying that Laura was a successful full-time college student during the 1974-75 school year, and that she was thereafter prevented from returning to college within 150 days as a full-time student for the fall 1975 semester by the onset of mental illness during the interim summer vacation. Further, evidence has been furnished verifying that she subsequently attempted to continue her studies while she was a psychiatric outpatient. In our view this evidence tends to preclude any conjecture that she might have intended to discontinue college attendance at the end of her freshman year. Hence, under the applicable

laws and regulations, we would have no objection to a determination that Laura is eligible to receive a Survivor Benefit Plan annuity as a "dependent child" incapable of supporting herself because of mental incapacity incurred before her twenty-second birthday while she was pursuing a full-time course of study. Question "a" is therefore answered affirmatively.

Termination of Annuity During Periods of Self-Support

The second question is:

b. It appears Laura's illness improves and then relapes. If question a is answered affirmatively, is the Survivor Benefit Plan annuity payable for periods in which she is self-supporting? Does the eligibility terminate when she becomes self-supporting regardless of future relapses?

In *Matter of Elrod,* 62 Comp. Gen. 193 (1983), we held that payments made under military survivor annuity plans on the basis of a beneficiary's mental or physical incapacity may properly be suspended if evidence exists demonstrating that the beneficiary has become independently capable of earning amounts sufficient for his own personal needs through substantial and sustainable gainful employment. We said that in any given case the determination of whether the beneficiary had become capable of self-support would have to depend upon a full consideration of the individual facts of that particular case.

In the *Elrod* decision, we also noted that while provisions of law governing the administration of military survivor annuity plans did not specifically authorize the reinstatement of a suspended annuity, neither did those provisions expressly preclude a disabled beneficiary from seeking reinstatement of this annuity following a period of suspension. We said that in light of the beneficial purposes for which the plans were established and the current national policy of encouraging employment of the handicapped, it may be that reinstatement should be allowed in an appropriate case. We therefore indicated that if an appropriate case were presented, we would consider the circumstances with a view towards modifying our earlier decision in 44 Comp. Gen. 551 (1965), in which it was held that if a survivor annuity paid to a handicapped beneficiary under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431–1446) was suspended it could not be reinstated in the absence of specific statutory authority.

In the present case, our view is that because of mental illness Laura was incapable of self-support through substantial and sustainable gainful employment during the period from January 1978 to July 1981. In particular, we note that the records of the case reflect that while a psychiatrist in March 1980 expressed the opinion that she was then capable of self-support, when she was able to obtain gainful employment in July 1980 she was actually unable to sustain that employment beyond a brief 3-week period because of mental instability. Hence, we would have no objection to the issu-

ance of annuity payments for Laura's benefit covering the period from January 1978 to July 1981. See 44 Comp. Gen. 551, cited above, for answers to questions other than that regarding reinstatement of an annuity after suspension.

However, during the prolonged 6-month period beginning in July 1981, Laura had recovered to the extent that she was apparently able to lead a normal life and to earn amounts sufficient for her personal needs through sustained employment. Our view is that she was then no longer incapable of self-support because of mental illness, and that payment of an annuity covering the period of her 6 months of gainful employment could properly be suspended unless evidence is furnished showing that her earnings were insufficient to take care of her ordinary living expenses. Compare *Matter of Elrod,* cited above.

It is also our view that in this case the circumstances of Laura's subsequent loss of employment and self-sufficiency, due to the original disabling condition, warrant reinstatement of the annuity effective on the date she became unemployed. Our decision in 44 Comp. Gen. 551, cited above, involved the Retired Serviceman's Family Protection Plan and not the more recently enacted Survivor Benefit Plan. However, to the extent that the conclusion stated with regard to reinstatement of survivor benefits might be considered applicable to the Survivor Benefit Plan that decision will not be followed. Further, to the extent that Retired Serviceman's Family Protection Plan benefits may be involved in other cases that decision will no longer be followed.

Our view is that the reinstated annuity may properly be continued until a determination is made that Laura has again recovered to the point of being capable of self-support, under the procedures and policies described in *Matter of Elrod,* cited above. In this particular case we find that a psychiatric opinion concerning her recovery, by itself, would not be a proper basis to support such a determination of self-sufficiency. Suspension of the annuity would be warranted if on the basis of sufficient competent information it may be concluded that she has recovered and is able to obtain gainful employment that is sustainable at wages sufficient to cover ordinary living expenses.

Guardianship Requirements

The third question presented in the submission is:

> c. If the Survivor Benefit Plan annuity is payable, should a guardian be appointed or may we accept a Custodianship Certificate signed by [Laura's mother]? Or may the annuity be paid directly to Laura?

It is indicated that this question has arisen because the issue of Laura's legal competency has never been adjudicated by a court of the State of her domicile. Hence, a court has never had the occasion to consider whether a guardian should be appointed to manage

her affairs. The reason for this is that Laura herself has apparently on occasion voiced objection to being made the respondent in proposed competency proceedings. Also, Laura's mother consulted private legal counsel about competency proceedings and was apparently advised that it would be difficult if not impossible for her to obtain legal guardianship under the laws of the State of domicile unless the proceedings were initiated at a time when Laura was physically confined in a hospital for treatment of mental illness.

In lieu of a court guardianship order, Laura's mother has filed a Custodianship Certificate, AFAFC Form 0-428, with the Air Force Accounting and Finance Center indicating that Laura is of age but that she was in the process of applying for guardianship, but claiming payment as custodian of any moneys due Laura. It also appears that at an earlier time Laura signed a power of attorney form authorizing her mother to receive and negotiate checks payable to her order, but Finance Center officials declined to accept that power of attorney.

It is necessary that a good acquittance be obtained by the Government when payments are made to persons under Federal law. We have held that when amounts due to a minor are involved, a good acquittance results through payment to the minor's natural guardian without formal court appointment, provided that the applicable laws of the State of domicile regarding payments to minors authorize that procedure as a means of obtaining acquittance and the matter is otherwise free from doubt. See 47 Comp. Gen. 209 (1967). However, in this case Laura's mother cannot properly be considered as natural guardian and custodian of a minor, since Laura has attained the age of majority. Hence, our view is that annuity payments due to Laura may not properly be made to her mother on the basis of the Custodianship Certificate.

Concerning the power of attorney form that was signed by Laura and submitted to the Finance Center by her mother, generally a competent adult may appoint another to act on his behalf as his agent and attorney in fact through the execution of letters or powers of attorney, but third parties have an obligation to ascertain the extent of the agent's authority, and to be aware that a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. 2A C.J.S. *Agency* sec. 141.a., 150 *et seq.* In the circumstances presented here it is our view that Laura's known mental incapacity made her power of attorney of too doubtful validity to serve as a proper basis for payments from appropriated funds to an agent designated by her, and that the Finance Center officials therefore acted correctly in declining to accept her power of attorney.

Consequently, it is our view that the concerned accounting and finance officials should now make inquiry to ascertain the state of Laura's present mental capacity. It may be that she is sufficiently

competent at the present time to manage responsibly amounts due her and to use the annuity properly for her own maintenance. In that case a good acquittance will be obtained by issuing payment directly to Laura as a competent adult. On the other hand, if Laura is now hospitalized because of mental illness, or if she is not considered by psychiatric opinion to be capable of managing her personal finances, then the amounts due should remain credited to her account, until either she recovers sufficient competency to personally receive payment, or a guardian authorized to receive payment under applicable State law is appointed by a court.

The three questions presented are answered accordingly. The voucher enclosed with the submission may not be approved for payment as is, but is being returned for further processing consistent with the views expressed in this decision.

[B-209191]

Subsistence—Per Diem—Military Personnel—Temporary Duty—Appropriation Limitations—Exceptions

The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended.

Matter of: Lieutenant Commander William J. Harrigan, *et al.*, April 13, 1983:

By letter of September 7, 1982, Lieutenant Commander William J. Harrigan asks whether there is any basis to excuse his liability and that of other members of the Helicopter Operations Group, National Oceanic and Atmospheric Administration, arising out of overpayments of subsistence expenses made in disregard of the principle set forth in *Matter of Bureau of Indian Affairs,* 60 Comp. Gen. 181 (1981). Agency bills of collection issued to these members of the uniformed services were the subject of our Claims Group's letter of July 19, 1982, advising Commander Harrigan that overpayments of per diem or subsistence expenses may not be considered for waiver under 5 U.S.C. 5584. While the overpayments may not be waived, for the reasons set forth herein, we find that the bills of collection should be canceled.

The record indicates that at varying times between January 21 and May 20, 1981, members of the Helicopter Operations Group performed temporary duty in the State of Alaska. Lodgings were procured by purchase order and were furnished to the members who were reimbursed for the remainder of their subsistence expenses on the basis of individual travel vouchers. On July 27, 1981, the

members were issued bills of collection for repayment of subsistence expenses they had received in excess of the maximum fixed by regulation. The bills of collection were issued on the basis of our holding in *Matter of Bureau of Indian Affairs,* 60 Comp. Gen. 181 (1981).

Matter of Bureau of Indian Affairs held that while a Government contracting officer may procure rooms or meals from a commercial concern for employees on temporary duty, appropriated funds are not available to pay per diem or actual expenses of employees in excess of that allowed by statute or regulation, whether by direct reimbursement or indirectly by furnishing meals and/or rooms by contract. While that decision was based on the general proposition that officers of the Government may not do indirectly that which statute or regulation forbids doing directly, it was specifically addressed to the per diem and subsistence expense provisions of 5 U.S.C. 5702 applicable to civilian employees of the Federal Government. In issuing the bills of collection in this case, the agency's finance office concluded that the principles of law underlying our holding in 60 Comp. Gen. 181 are equally applicable to members of the uniformed services who receive per diem or subsistence expenses under 37 U.S.C. 404 and 405. We agree that agencies may not circumvent the per diem or actual subsistence expense limitations prescribed by statute or regulation by contracting with commercial concerns for lodgings or meals to be furnished members of the uniformed services or civilian employees.

Our holding in *Bureau of Indian Affairs* was made prospective in application from January 19, 1981, the date the decision was issued, for the reason that there had been a lack of precedent in this particular area. Since that decision was not, by its specific terms, applicable to members of the uniformed services, we will not object to per diem payments such as those already made to Commander Harrigan that exceed statutory or regulatory maximums as a result of the agency's having contracted for lodgings or meals with commercial concerns. Effective from the date of this decision that rule will be applicable to per diem payments made to members of the uniformed services.

The bills of collection issued Commander Harrigan and other members of the Helicopter Operations Group should be canceled.

[B-210291]

Agriculture Department—Rural Electrification Administration—Guaranteed Loans of Federal Financing Bank—Cost of Servicing—Reimbursable Basis Requirement

Rural Electrification Administration (REA) may not use funds either from its annual appropriation or REA's Revolving Fund to pay, on a nonreimbursable basis, for the cost of servicing REA guaranteed loans made by the Federal Financing Bank (FFB). Definition of a guaranteed loan under 7 U.S.C. 936 as one which is initially made, held, and serviced by a legally organized lender agency, together with other

provisions in REA's and FFB's legislation, indicate that since FFB acts as the lender, REA can only perform servicing function as FFB's agent on a reimbursable basis.

Matter of: Rural Electrification Administration Guaranteed Loans—Payment of Servicing Costs, April 13, 1983:

This decision is in response to a request from the Administrator of the Rural Electrification Administration (REA) for our opinion concerning the payment of costs incurred in connection with the servicing of REA guaranteed loans made by the Federal Financing Bank (FFB). The Administrator's specific question is whether he has authority "to use funds appropriated under the RE Act or in the Rural Electrification and Telephone Revolving Fund for the purpose of servicing FFB obligations, repayment of which is guaranteed pursuant to § 306 of the RE Act, on an unreimbursable basis where there have been no defaults on the obligations?" [1] For the reasons set forth hereafter, we do not believe the Administrator of REA has such authority.

Under section 306 of the Rural Electrification Act of 1936, as amended, 7 U.S.C. § 936, REA is authorized to provide financial assistance to borrowers for the purpose of rural electrification by guaranteeing 100 percent of loans made by "legally organized lending" agencies. In 1981, this provision was amended by section 165(b) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 379, to provide that at the request of any borrower of a loan to be guaranteed by REA "the loan shall be made by the Federal Financing Bank * * *."

Although the 1981 amendment requires FFB to make REA-guaranteed loans at the request of the borrower, FFB had already been making REA guaranteed loans under the terms of the Loan Commitment Agreement between FFB and REA, dated August 14, 1974. Under the terms of the Agreement, FFB agreed to purchase "obligations guaranteed by the Administrator of REA" under the Rural Electrification Act. Paragraph 5(b) of the Agreement provides that any loan servicing required with respect to these loans "shall be performed by REA on behalf of FFB." That paragraph further provides that "REA shall be reimbursed by FFB for such loan servicing pursuant to section 10 of the Federal Financing Bank Act of 1973 at the rate of two one-thousandths of one percentum (0.0002) per annum of the amounts owed on guaranteed loans at the end of each calender year."

It appears that FFB is interested in modifying the Loan Commitment Agreement to provide for REA to service the FFB loans on a nonreimbursable basis. Hence, REA has presented this question as to its authority to use its appropriated funds or moneys in the Re-

[1] The Administrator's letter contained a second question as to whether FFB was "required to provide for the servicing of REA-guaranteed loans assuming REA does not undertake such servicing?" Subsequently, we were informed by an REA official that it was withdrawing its second question. Therefore, our decision does not formally respond to that question. However, since the two questions were not unrelated, our answer to the remaining question may have some bearing on the question that was withdrawn as well.

volving Fund to pay the servicing costs without reimbursement from FFB.

As recognized in the Administrator's letter, this is not the first time a question has arisen concerning the FFB-REA Agreement. In B-162373-O.M., July 31, 1979, we answered a question raised by one of our audit divisions as to the legality of FFB acting as "a lender in the first instance" by purchasing the REA/guaranteed note from the borrower.[2] In our opinion we concluded "that the REA/FFB arrangement does not violate the respective statutory authorization of either agency."

With respect to the "servicing" issue, we observed that the REA-FFB arrangement might appear to conflict with the statutory definition of a guaranteed loan because REA and not FFB "services the loan and retains physical possession of the loan instrument." However, we concluded that no such conflict existed because REA serviced the loan on a reimbursable basis as the agent for FFB which was legally entitled as the holder of the note to receive the borrower's payments after collection by REA. We said that this was consistent with section 10 of the FFB Act which authorizes FFB to utilize the services of another Federal agency on a reimbursable basis. Our conclusion also relied heavily on REA's explanation that the servicing arrangement between FFB and REA did not violate the statutory scheme since FFB assumed the lender's servicing responsibility "by paying REA therefor," in accordance with a provision in the FFB Act "which confers authority on it and on other Federal agencies to arrange for performing, on its behalf, actions like loan servicing."

Thus, it is clear that our opinion upholding the legality of the REA-FFB arrangement, as well as REA's explanation of its legality, relied to a considerable degree on the fact that, while REA was actually performing the loan servicing function, it was doing so as agent for FFB on a reimbursable basis.

As stated above, 7 U.S.C. § 936 was amended in 1981 to require FFB to act as the lender in making these guaranteed loans if requested to do so by the borrower. However, this amendment did nothing to alter the nature of the relationship between FFB and REA or shift the responsibility of paying servicing fees from FFB to REA. Nor did the amendment change the definition of a guaranteed loan in 7 U.S.C. § 936 as "one which is initially made, held, and serviced by a legally organized lending agency and which is guaranteed by the Administrator hereunder." Therefore, at least when the loan is first made, the original lender must bear the responsibility of servicing these loans either by performing the servicing directly or by paying for the cost of the servicing if conducted by its agent.

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[2] 7 U.S.C. § 936 had not yet been amended to require FFB to make these loans if requested to do so by the Borrower.

Moreover, we note that the word "initially" was added to the definition of a guaranteed loan by section 1 of Pub. L. No. 94-124, approved November 4, 1975, as part of an amendment making it clear that REA-guaranteed loans could be assigned. See S. Rep. No. 94-424, 94th Cong., 1st Sess. 2, 3 (1975). The addition of the word "initially" was not intended to permit shifting the burden of servicing the loan from the originating lender to REA. In our opinion, the only way the original lender might free itself of the responsibility for paying for the servicing of the loan would be by shifting it to an assignee in connection with an assignment of the loan. Servicing the loan could not become the obligation of REA unless and until the loan went into default.

Since, under the statute, the servicing of the loan is the responsibility of the lender rather than REA, it is our view that REA cannot use its own funds to pay for the costs of the servicing. It can perform the servicing so long as it is reimbursed for the costs by the lender.

Examination of the REA and FFB legislation provides additional support for our position. As we stated in our 1979 opinion, section 10 of the FFB legislation, 12 U.S.C. § 2289(10), provides that the FFB has the power "to act through any corporate or other agency or instrumentality of the United States, and to utilize the services thereof *on a reimbursable basis* * * * ." [Italic supplied.] Although this provision is not written in mandatory terms, it certainly suggests that it was the intent of the Congress that when FFB uses the services of another agency, as it is clearly doing in this case, it should reimburse the agency for those services.[3] Contrast this provision with the language contained in section 403 of the Rural Electrification Act of 1936, as amended, 7 U.S.C. § 943(b), which provides that in performing its statutory responsibilities the Rural Telephone Bank may use "the facilities and the services of employees of the Rural Electrification Administration or any other agency of the Department of Agriculture, without cost to the telephone bank * * *."

Our position finds further support if we analyze the language contained in 7 U.S.C. § 932(b) which governs the liabilities and uses of the revolving fund—one of the two possible sources that REA could use to pay the servicing costs, if allowed. Under that section the assets of the revolving fund are available only for certain stated purposes, one of which is described as follows:

> (7) payment of taxes, insurance, prior liens, * * * expenses for necessary services, including construction inspections, commercial appraisals, loan servicing, * * * and other program services, and other expenses and advances authorized in section 907 of this title in connection with insured loans. *Such items may be paid in connection with guaranteed loans after or in connection with the acquisition of such loans or security thereof after default,* to the extent determined to be

[3] Also, note 31 U.S.C. § 1535 which provides for services to be performed by one agency for another on a reimbursable basis.

necessary to protect the interest of the Government, or in connection with any other activity authorized in this Act; * * * [Italic supplied.]

In its letter to us setting forth its position concerning this matter, the Department of the Treasury, on behalf of FFB, maintains that the last phrase—"or in connection with any other activity authorized in this Act"—is very broad and encompasses expenses for the servicing of guaranteed loans prior to default. We disagree. The express statutory language provides that with respect to guaranteed loans, as opposed to insured loans, servicing and other expenses can be paid "after default" if necessary to protect the Government's interest. Treasury's interpretation would require us to conclude that the final phrase of the last sentence essentially nullified the first part of the sentence which we underlined above. That would violate a basic canon of statutory construction and would require us to adopt a strained interpretation of the express statutory language.

As we read 7 U.S.C.§ 932(b)(7), the revolving fund can be used to pay all of the different kinds of expenses, including loan servicing, for insured loans—which are defined in 7 U.S.C. § 935(c) as loans "which are made, held, and serviced by the Administrator * * *." However, with respect to guaranteed loans, these kinds of expenses can only be paid after or in connection with a default. Finally, with respect to other REA activities, not involving insured or guaranteed loans, the revolving fund can be used to pay such expenses, if necessary.

Moreover, we do not believe that the use of any of REA's current appropriations to pay for these servicing costs without reimbursement from FFB would be consistent with the recently expressed intent of Congress in connection with its enactment of the Agriculture, Rural Development, and Related Agencies Appropriation Act, 1983, Pub. L. No. 97-370, 96 Stat. 1787, approved December 18, 1982. The conference report on the appropriations bill reads as follows in this respect:

> Under a long-standing agreement between the Rural Electrification Administration and the Federal Financing Bank, FFB has reimbursed REA for its billing and collection costs on FFB loans guaranteed by REA. The conferees have been advised that the REA-FFB agreement expired on November 30, 1982, and has not been renewed because of FFB's reported refusal to continue this reimbursement process. In view of the fact that the 1981 amendments to the Rural Electrification Act now direct the FFB to make loans under an REA guarantee at the request of the borrower, FFB's legal obligation to make loans under REA's guarantee is not contingent upon the existence of an agreement between the two agencies. *REA is expected to continue providing billing and accounting and related services on existing and new loans made by FFB under an REA guarantee, and FFB is expected to continue reimbursing REA for this service.* [Italic supplied.] See H. Rep. No. 97-957, 97th Cong. 2d Sess. 17 (1982).

In its letter to us, Treasury also makes several other arguments to support its position. Treasury argues that in adopting the 1973 amendment to the REA legislation, Pub. L. No. 93-32, 87 Stat. 65, which added the loan guarantee section to the statute, both the Congress and the Administration intended to retain "REA's tradi-

tional and time-proven role as a loan maker and servicer of loans." *See* H. Rep. No. 93-91, 93rd Cong., 1st Sess. 27 (1973). While we would not necessarily dispute Treasury's contention that one of the objectives of the legislation was to retain REA's role as maker and servicer of loans, Public Law 93-32 did much more than just establish a loan guarantee program. For example, as stated above, the Act established an insured loan program in which REA does act as the "maker and servicer of loans." Obviously, when REA guarantees a loan made by another lender it is not functioning as a loan maker. Similarly, we do not believe that the Congress intended for REA to fill the role of loan servicer in connection with guranteed loans made by lenders other than REA. If Treasury's contention were correct, REA would be responsible for servicing, or paying for the servicing, of all of its guaranteed loans, including those made by private, non-Governmental lenders. This would not be reasonable in our view and would not be consistent with the way in which loan guarantee programs of other agencies operate.

In addition, Treasury argues that as an alternative to the theory that REA has the authority to pay for the servicing of guaranteed loans, REA could redefine "servicing" in such a manner "as to coincide with the service currently provided by FFB." Under this view, functions currently performed by FFB, such as "processing and making disbursements, interest rate and prepayment cancellation, determination of principal and interest payment schedules and payment monitoring," would be considered loan servicing and would remain the responsibility of FFB. On the other hand, what REA now does and characterizes as servicing would be redefined as "program administration," and would be paid for by REA as administrative expenses.

We cannot endorse this approach. The statute specifically refers to loan servicing. While the term is not defined in the legislation we must presume, in the absence of any contrary indication, that in using the term "servicing"—a not uncommon term in the banking industry—Congress intended it to be given its generally accepted meaning. Accordingly, REA would not be justified in redefining that term so as to arbitrarily exclude those functions and tasks that are generally performed by lenders in connection with managing and overseeing the loans they make. In this respect, we note that in paragraph 5(b) of the 1974 Loan Commitment Agreement between FFB and REA, FFB apparently agreed that REA was performing "loan servicing" for FFB under 7 U.S.C. § 936 and not "program administration."

Having resolved the basic question we must address one final point raised by REA informally. That is, we would have no objection if REA determines that the current annual charge of .0002 per centum on the outstanding balance of guaranteed loans that is paid by FFB under the 1974 Agreement is either too high or too low and should be adjusted accordingly. However, the rate to be assessed

against FFB should represent, as closely as can be determined, the actual cost to REA of performing the servicing functions that would otherwise have to be performed by FFB as the lender.

In accordance with the foregoing, the Administrator of REA may not use funds either from its annual appropriation or in the Rural Electrification and Telephone Revolving Fund to pay, on a nonreimbursable basis, for the cost of servicing REA guaranteed loans made by FFB.

[B-208598]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services

A member of the uniformed services who is separated from his or her spouse, who is also a member, and who has legal custody of one or more of their children on whose behalf the spouse contributes no support, is entitled to a basic allowance for quarters at the with-dependents rate, regardless of the spouse's entitlement, provided that the dependents on account of whom the increased allowance is paid do not reside in Government quarters.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—With Dependent Rate—Eligibility—Separation of Husband and Wife—Legal Sufficiency of Separation Agreement

A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic allowance for quarters, even though the agreement was not issued or sanctioned by a court. However, a member's entitlement to basic allowance for quarters based on child support obligations created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody.

Matter of: Senior Airman Donna L. McCoy, USAF, and Staff Sergeant Marty L. Cooper, USAF, April 15, 1983:

This action responds to questions submitted by Air Force accounting and finance officers concerning the claims of Senior Airman Donna L. McCoy, assigned to Keesler Air Force Base, Mississippi, and Staff Sergeant Marty L. Cooper, assigned to Ramstein Air Base, Germany, for increased basic allowance for quarters on account of their dependents. Since they involve similar questions, the two separate requests for advance decisions on these claims were approved and consolidated by the Department of Defense Military Pay and Allowance Committee and assigned control number DO-AF-1404. We conclude that both members are entitled to payment.

Facts—McCoy's Case

Donna McCoy is legally separated from her spouse, Johnny E. McCoy, who is also a military member. Two children were born of their marriage. By the terms of the separation agreement, Donna

has care and custody of one of their children, and Johnny has care and custody of their other child. Their separation agreement further provides that no child support shall be paid by or to either parent until further order of the court. The agreement, which became effective and binding on June 3, 1982, provides that the terms and conditions thereof are intended to become a part of the final judgment of divorce terminating the McCoys' marriage.

On May 21, 1982, Donna McCoy terminated her residence with Johnny McCoy in Government family quarters. At that time she claimed basic allowance for quarters at the with-dependents rate, since she and the child in her custody then began residing in private quarters. Johnny McCoy and the child in his custody continued residence in Government family quarters.

The accounting and finance officer asks (1) whether under these circumstances Donna McCoy is entitled to an increased quarters allowance as claimed, and (2) whether basic allowance for quarters at the with-dependents rate will be payable to both members if Johnny McCoy should also move to private quarters with the child in his custody.

Facts—Cooper's Case

The same questions are raised concerning the claim of Sergeant Marty L. Cooper. Both Marty Cooper and his wife, Evelyn Cooper, are military members stationed in Germany. On May 27, 1982, they executed a notarized separation agreement, which gave Marty custody of one of their three children. Evelyn received custody of their other two children. Marty terminated his residence with Evelyn in Government quarters and returned the child in his custody to the continental United States. Evelyn and the children in her custody continued their residence in Government quarters.

Marty Cooper claims basic allowance for quarters at the with-dependents rate on account of the child in his custody, who resides in private quarters. In connection with claims for basic allowance for quarters under such circumstances, the submission indicates some uncertainty as to the legal sufficiency of a separation agreement that has not been issued or sanctioned by an appropriate court. We are also asked whether the answers to the questions presented would be the same if the separation agreement is subsequently incorporated into the court order and final decree of divorce.

Discussion

A member of a uniformed service who is entitled to basic pay is also entitled to an increased basic allowance for quarters on account of his dependents if adequate Government quarters are not provided for them. 37 U.S.C. § 403 (1976). The purpose of the increased allowance is to reimburse the member for a part of the ex-

pense of providing private quarters for his or her dependents. 60 Comp. Gen. 399 (1981).

We have held that when two members are married to each other and have one or more children of their marriage, only one member is entitled to an increased basic allowance for quarters on account of their common dependent(s), even though one of the members may already receive an increased allowance on behalf of dependents acquired prior to the present marriage. 54 Comp. Gen. 665 (1975); and *Matter of Cruise,* B-180328, October 21, 1974.

If two members who are married to each other have dependents of their marriage and subsequently separate or divorce, generally only one of the members may receive an increased basic allowance for quarters for their common dependents. For example, if the non-custodial member is supporting the common dependents in an amount required by the regulations (Department of Defense Military Pay and Allowances Entitlements Manual, paragraphs 30236a(1) (c and d)), pursuant to a legal obligation created by an agreement or court order, that member is entitled to the increased allowance. *Matter of Doerfer,* B-189973, February 8, 1979. However, if the member who is legally required to provide child support is entitled to an increased allowance on account of other dependents (i.e., dependents not common to the relevant marriage to another member), then the custodial member is entitled to an increased allowance on behalf of their common dependent(s), if the custodial parent provides the substantial portion of the dependent's support. Pay and Allowances Manual, paragraph 30236a(3); 60 Comp. Gen. 399 (1981); 52 *id.* 602 (1973); *Matter of Doerfer,* cited above.

These rules are based on the assumption that the non-custodial member is providing support pursuant to a legal obligation to one or more of the common dependents not residing in his household. However, in a situation where a custodial member has established a separate household and the other member is not paying that parent for any of the common dependents in his or her care at the minimum amount required by the Pay and Allowances Manual, then that custodial member is entitled to an increased basic allowance for quarters on account of the dependents in his or her care. This is so because a divided custody and support arrangement separates the two members' dependents so that they are members of two different households and are no longer the "common dependents" of the two members.

In the present cases, one member has legal custody of one or more dependent and the other member has legal custody of the other dependent or dependents, neither member is legally obligated to support the dependent or dependents in the custody of the other, and the dependents of one member do not reside in the same household with the dependents of the other. Thus, the two members no longer have "common dependents" for purposes of entitlement to increased basic allowance for quarters. Therefore, under

the provisions of 37 U.S.C. § 403, either or both of the members may be paid the increased allowance, each in his or her own individual right, provided that the dependent on account of whom the increased allowance is paid resides in private, non-Government quarters. See 58 Comp. Gen. 100 (1978) and *Matter of Ranazzi,* B-195383, November 6, 1979. Entitlement to the increased allowance commences on the date the member and the child in his or her custody establish a residence in non-Government quarters or the effective date of the separation agreement, whichever is later.

Concerning the legal sufficiency of the separation agreement in the Coopers' case, for the purpose of determining a member's eligibility for increased basic allowance for quarters, if under the law of the controlling jurisdiction a husband and wife are authorized to enter an agreement that contemplates an existing or immediate marital separation, which does in fact occur, such agreement is generally recognized by the courts. *Hill* v. *Hill,* 142 P.2d 417 (Cal. Sup. Ct. 1943). This is so even though the agreement may not have been submitted to the court for approval. *Singer* v. *Singer,* S.W.2d 605 Mo. Ct. App. (1965).

In concert with these general principles, we have recognized a written, properly executed separation agreement as a legitimate statement of the parties' marital separation and legal obligations pertaining to their marriage, for the purpose of determining a member's entitlement to certain allowances. See 58 Comp. Gen. 100, 103 (1978), and *Matter of Doerfer,* cited above; see also Pay and Allowances Manual, paragraphs 30236d and e.

It should be noted, however, that although the separation agreement may include provisions for custody and maintenance of the couple's children, such agreement is not binding upon the court in awarding custody. *Hudson* v. *Hudson,* 257 S.E. 2d 448 (N.C. Ct. App. 1979). Thus, while the legal support obligations the two members assumed under the separation agreement may be recognized for entitlement to increased basic allowance for quarters, both members' entitlement should be reassessed following actions by the court regarding custody and support. If the members' custody and support obligations remain unchanged, so also do their entitlements. If these arrangements are modified by the order of the court, changes in the members' allowance may be required.

Conclusion

Accordingly, payment of the increased allowance is authorized for Airman Donna McCoy, beginning on June 3, 1982, and for Sergeant Marty Cooper, beginning on the date he and the child in his custody assumed residence in non-Government quarters, if that date is subsequent to the effective date of his separation agreement. If either of their spouses moves from Government quarters to private quarters, Airman McCoy's or Sergeant Cooper's entitle-

ment to the increased allowance will not be affected. But, presumably, the other spouse then also will become entitled to the quarters allowance at the with-dependents rate, unless the present custody and support arrangements are modified. Incorporation of support agreements into the orders of the court and final decrees will not affect these holdings.

[B-208708]

Officers and Employees—Transfers—Leases—Unexpired Lease Expense—Reimbursement—Governed by Terms of Lease

To settle lease which did not contain termination clause, transferred employee paid rent for unexpired 4½ month term of lease. Employee is entitled to full amount of lease settlement expenses paid in avoidance of potentially greater liability. Reimbursement is not diminished by agency's finding that it is customary for landlord to refund rent when he has relet premises during unexpired term of lease since reimbursement is governed by terms of lease and not what is customary in locality.

Matter of: Norman Mikalac, April 15, 1983:

By letter of July 21, 1982, an authorized certifying officer with the Defense Logistics Agency requested an advance decision on the reclaim of Mr. Norman Mikalac for a month's rent paid in connection with the settlement of an unexpired lease. The request was forwarded through the Per Diem, Travel and Transportation Allowance Committee and assigned PDTATAC Control No. 82-20. The employee's payment of rent for the 4½ month period of the unexpired lease was in settlement of a potentially greater liability under the terms of that document. For this reason and because neither state law nor the terms of the lease obligated the landlord to relet the premises and hold any rent received for the account of the former tenant, the employee is entitled to the full amount of the settlement, notwithstanding the fact that the former landlord relet the premises for the last month of the lease term.

By Travel Order No. TGB 81-C-0831, dated July 16, 1981, Mr. Mikalac was transferred from Philadelphia, Pennsylvania, to a position with the Defense Logistics Agency in Baltimore, Maryland. At the time he was notified of his transfer Mr. Mikalac was residing in a house he had rented under a 1-year lease which expired December 31, 1981. The lease contained no termination clause and did not permit subletting without approval by the landlord.

The record indicates that when Mr. Mikalac was notified of his transfer, he contacted his landlord and offered to settle his liability under the lease by paying rent through the end of October 1981. On July 22, 1981, he received a letter from the owner's attorney advising that he was obligated under the terms of the lease to pay the full monthly rental amount for the unexpired period of the lease through December 1981. That letter stated in part:

> Your failure to completely satisfy my client with regard to your full obligation under the terms of above lease and the expenditures detailed below will ensure that the following actions are taken: (1) The pursuit by my client of all available legal

remedies to which he is entitled; (2) The confiscation by my client of the $500 security deposit held under the above lease; (3) An unsatisfactory reference by my client to your prospective landlord.

Attached to the letter was an itemized list of expenses the lessor would incur as a result of the termination totaling $2,251.50. Mr. Mikalac ultimately agreed to pay the rent for the remainder of his lease (4½ months). His security deposit of $500 was returned and the lessor did not pursue his claim for additional damages.

When Mr. Mikalac filed his voucher on September 28, 1981, he claimed $1,798 for the cost of terminating his lease. The agency disallowed $395, an amount equal to the final month's rent, upon learning that the landlord had relet the house in December 1981. Based on its determination that a tenant would ordinarily be entitled to a return of forfeited rent where the landlord relet the premises during the unexpired term of the lease, the agency found that the $395 amount in question was not a customary or reasonable expense of settlement. Although Mr. Mikalac was advised to recover the $395 from his former landlord, the landlord's attorney has informed the agency that the parties' agreement constituted a complete settlement of their obligations under the lease and the employee is not entitled to return of the 1-month's rent in issue.

The criteria to be applied to determine whether Mr. Mikalac is entitled to reimbursement for the full amount of the expenses incurred in settling his unexpired lease are set forth in paragraph C14003 of Volume II, Joint Travel Regulations (JTR), which provides:

> Expenses incurred for settling an unexpired lease (including month-to-month rental) on residence quarters occupied by the employee at the old duty station may include broker's fees for obtaining a sublease or charges for advertising an unexpired lease. Such expenses are reimbursable when:
>
> 1. applicable laws or the terms of the lease provide for payment of settlement expenses,
>
> 2. such expenses cannot be avoided by subleasing or other arrangement,
>
> 3. the employee has not contributed to the expense by failing to give appropriate lease termination notice promptly after he has definite knowledge of the proposed transfer,
>
> 4. the broker's fees or advertising charges are not in excess of those customarily charged for comparable services in that locality.
>
> Itemization of these expenses is required, the total amount of which will be entered in the travel voucher. The voucher may be submitted separately or with a claim that is to be made for expenses incident to the purchase of a dwelling. Each item must be supported by documentation showing that the expense was, in fact, incurred and paid by the employee.

Mr. Mikalac's lease did not contain a specific provision for payment of liquidated damages in the event of early termination. We have held, however, that the first condition for reimbursement (contained in item 1) is not to be interpreted as requiring such a provision and in the absence of such provision, have allowed reimbusement where the employee entered into a reasonable settlement of his obligations under the terms of that lease. *Matter of Jason*, B-186035, November 2, 1976. Similarly, since the lease did not contain a notice provision, item 3 is not in issue and Mr. Mikalac has

not claimed brokerage or advertising expenses which are the subject of item 4. With regard to item 2, the terms of the lease specifically prohibited subletting. Under Pennsylvania law a landlord has no clear duty to mitigate damages when there has been a premature termination of a lease. *Ralph* v. *Deiley,* 141 A. 640 (1928); 21 A.L.R.3d 534 (1968); *Cusamano* v. *Anthony M. DiLucia, Inc.*, 421 A.2d 1120, 1125 n.9 (1980).

Under the terms of Mr. Mikalac's lease, the landlord had the option of insisting upon rent for the unexpired balance of the term of the lease, together with other costs and expenses, upon the tenant's failure to pay rent or upon his abandonment of the premises. Like Pennsylvania law, the lease imposed no clear duty upon the landlord to relet the premises in an effort to reduce the former tenant's liability. In this case, the record indicates that Mr. Mikalac offered to settle his outstanding liability by payment of rent through October 1981. His offer was summarily rejected, and he was advised that his landlord would settle for no less than payment of rent for the unexpired term of the lease and that he faced even greater liability should he be unwilling to meet those terms.

Since Mr. Mikalac attempted to reduce his liability and since the payment is no more than is required by the terms of the lease in the event of the tenant's premature termination, Mr. Mikalac is entitled to reimbursement for the $1,798 amount he had claimed as a lease settlement expense. Under the regulations, his entitlement is not diminished by the fact that it may not be customary for the landlord to insist upon or retain rent for the unexpired term of the lease where he has successfully relet the premises before the end of that term. Reimbursement for lease settlement expenses is governed by the actual terms of the lease and the requirement that the employee make a reasonable effort to settle his obligation thereunder. Under the regulations only broker's fees and advertising charges for the purpose of settling a lease are limited to those customarily charged in the locality.

[B-209581]

Mileage—Travel by Privately Owned Automobile—In Lieu of Government Vehicle—Reimbursement

Employee, who was a member of an agency review team and authorized to perform temporary duty travel in a group by Government-owned van, received permission to travel by privately owned vehicle as an exercise of personal preference. Since the agency did approve his privately owned vehicle use, and since the regulations do not authorize proration of reimbursement where Government vehicle is used anyway, employee may be reimbursed mileage at 7.5 cent rate authorized by Federal Travel Regulations para. 1-4.4c.

Matter of: Don L. Sapp—Reimbursement of Travel Expenses—Government Vehicle Available, April 15, 1983:

This decision is in response to a request from an Authorized Certifying Officer, General Services Administration, concerning the entitlement of Mr. Don L. Sapp, an agency employee, to be reimbursed mileage for use of his privately owned vehicle while performing temporary duty travel.

The issue presented is whether an employee may be reimbursed 7.5 cents per mile, or a prorata amount, when he uses a privately owned vehicle in lieu of a Government-furnished one.

Mr. Sapp is entitled to be reimbursed the full 7.5 cents per mile since the regulations do not provide for proration.

Mr. Sapp was a member of a review team which was to travel from Atlanta, Georgia, to Birmingham, Alabama, to perform temporary duty and return. A Government-owned van was available, which use was determined to be advantageous to the Government. Mr. Sapp requested and was authorized to use his privately owned vehicle for this travel as a matter of personal preference, while the rest of the review team traveled by Government van.

The submission points out that under the provision of the Federal Travel Regulations when an employee is permitted to use his privately owned vehicle as a matter of preference in lieu of Government-owned transportation, the rate of reimbursement for official travel is limited to 7.5 cents per mile, which approximates the cost of operating a Government-owned vehicle. Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), paragraph 1-4.4c. It is suggested that such a rule implies that only one traveler is involved, and the use of the privately owned vehicle is in lieu of the use of the Government vehicle. Thus, the cost to the Government by permitting the employee to use his own vehicle would not be increased. However, it is also pointed out that when multiple ridership in a Government vehicle is contemplated, each authorized deviation from the use of such vehicle would automatically increase the Government's cost. It is suggested that where a Government vehicle will still be used and where a passenger is authorized privately owned vehicle use as a matter of personal preference, in order to minimize the Government cost for the additional vehicle, the employee's reimbursement should be prorated.

Section 5704 of Title 5, United States Code, provides in part:

> (a) [I]n any case in which an employee who is engaged on official business for the Government chooses to use a privately owned vehicle in lieu of a Government vehicle, payment on a mileage basis is limited to the cost of travel by a Government vehicle.

Paragraph 1-2.2 of the FTR, promulgated thereunder, provides in part:

> b. *Selecting method of transportation to be used.* Travel on official business shall be by the method of transportation which will result in the greatest advantage to the Government, cost and other factors considered.

c. *Presumptions as to most advantageous method of transportation.*

* * * * * * *

(2) *Government-furnished automobile.* When it is determined that * * * an automobile is required for official travel, a Government furnished automobile shall be used whenever it is reasonably available.

(3) *Privately owned conveyance.* Except as provided in 1-2.2d, the use of a privately owned conveyance shall be authorized only when such use is advantageous to the Government.

* * * * * * *

d. *Permissive use of a privately owned conveyance.* When an employee uses a privately owned conveyance as a matter of personal preference and such use is compatible with the performance of official business * * * such use may be authorized or approved provided that reimbursement is limited in accordance with * * * [the provisions of 1-4].

The basic focus of these various provisions of the FTR is that Government vehicles should be used whenever available and appropriate. However, use of a Government vehicle is not required to the exclusion of all other comparable modes of transportation. The restraints imposed by the regulations are that when other transportation modes are permitted to be used, e.g., privately owned vehicles, and if authorized as compatible with the performance of official business, the reimbursement authorized is limited by paragraph 1-4.4c to the cost of operating the Government vehicle.

We agree that this concept seems to imply a single user of a Government vehicle. However, we believe that since sufficient multiple traveler situations have arisen in the past, and since the regulations have not specifically provided for this type of situation, it is not unreasonable to conclude that the provisions of paragraph 1-2.2d include any Government-employee passenger in a Government vehicle should use of his privately owned vehicle for personal preference be approved. In view of the fact that nothing is contained in the regulations permitting proration, coupled with the specific authority contained in FTR paragraph 1-4.4c, each employee who is permitted to use his privately owned vehicle as a matter of personal preference in lieu of transportation by Government-owned vehicle would be authorized to be reimbursed for official mileage at the 7.5 cent rate.

Accordingly, Mr. Sapp may be reimbursed for his official mileage at the 7.5 cent rate, if otherwise correct.

[B-202278]

Legislation—Recommended by GAO—Presidential Inaugural Ceremonies—Participation by Federal Agencies—Extent and Types of Participation

The Presidential Inaugural Ceremonies Act, now largely codified at 36 U.S.C. 721-730, is the primary legislation dealing with Presidential inaugurations. It authorizes Department of Defense (DOD) to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but even in these instances, the statute requires the PIC to indemnify the Government against losses. DOD itself recognizes that much of its extensive participation in Presidential

inaugural activities is fundamentally a matter of custom rather than being rooted in legal authority. Nevertheless, Presidential inaugurations are highly symbolic national events and DOD support was provided with the knowledge and approval of many members of the Congress over a period of years. General Accounting Office recommends that the Congress provide specific legislative guidance on the extent and types of support and participation in inaugural activities which Federal agencies are authorized to provide.

Appropriations—Defense Department—Inaugural Ceremonies—Extent of Appropriation Availability

Section 601 of the Economy Act, as amended, 31 U.S.C. 686 (now 31 U.S.C. 1535), permits one agency or bureau of the Government to furnish materials, supplies or services for another such agency or bureau on a reimbursable basis. However, since the Presidential Inaugural Committee (PIC) is not a Government agency and DOD used its own appropriations without reimbursement from either the PIC or Joint Congressional Committee on Inaugural Ceremonies in participating in the 1981 Presidential inaugural activities, the authority of the Economy Act was not available.

Appropriations—Defense Department—Inaugural Ceremonies—Extent of Appropriation Availability—Participation of Members and Employees Only

Participation in the inaugural ceremony and in the inaugural parade can be justified on the basis of its obvious significance for DOD, as well as for other Federal agencies. However, each agency may only incur and pay expenses directly attributable to the participation of its own employees. It is therefore improper for DOD, in the absence of specific statutory authority, to pay such costs as housing of high school band participants in the parade, lending military jeeps to pull floats provided by non-military organizations, providing administrative and logistical support to PIC offices, etc.

Appropriations—Defense Department—Inaugural Ceremonies—Extent of Appropriation Availability—Participation of Members and Employees Only—Use as Chauffeurs, etc.

Use of military personnel for VIPs and other non-military persons in the capacity of chauffeurs, personal escorts, social aides and ushers is improper under the general appropriations law principles and under DOD's community relations regulations. See 32 C.F.R. Parts 237 and 238.

President—Inaugural Ceremonies—Inaugural Balls—Status—Private Gatherings

Presidential inaugural balls are basically private gatherings or parties not generally available to the community, whose proceeds go to the private, non-Government PIC. They are neither official civil ceremonies nor official Federal Government functions under the DOD's community relations regulations (32 C.F.R. Parts 237 and 238). Therefore, DOD's appropriated funds are not available to cover the costs of participation by any of its employees or members.

To the Honorable William Proxmire, United States Senate, April 18, 1983:

This is in response to your request of February 19, 1981, for our opinion on the legality of certain support which the Department of Defense (DOD) provided for activities associated with the inauguration of President Ronald Reagan. More particularly, you asked

whether there was any specific statutory authority for the military to provide 1,120 service personnel as chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities. You noted that some members of the Presidential Inaugural Committee were provided with military drivers from mid-November 1980 until the end of January 1981. In addition, you requested any proposals we might have for a statutory remedy, in the event we concluded that there is no specific statutory authority for DOD to provide these kinds of support for Presidential inaugural activities.

There is no specific statutory authority for DOD to provide chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities, nor are many of DOD's inaugural activities covered by more general authorities such as the Economy Act or those which support expenditures for local community relations activities. The Presidential Inaugural Ceremonies Act does authorize DOD to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but DOD itself recognizes that its extensive participation in Presidential inauguration activities is fundamentally a matter of custom rather than being rooted in legal authority.

Accordingly, we must conclude that much of the support provided by DOD for 1981 inaugural activities was without proper legal authority. At the same time, it must be recognized that Presidential inaugurations are highly symbolic national functions for which DOD support has been provided with the knowledge and approval of members of Congress over the years. Lack of a statutory base for this support has resulted in practices questionable on policy as well as legal grounds.

In these circumstances, we recommend that Congress undertake a review of the Presidential Inaugural Ceremonies Act to establish a clear basis in policy and law for continuing participation by Federal agencies in Presidential inaugural activities. We will be glad to work with you in this endeavor. A detailed analysis follows.

DEPARTMENT OF DEFENSE ASSISTANCE FOR THE 1981 PRESIDENTIAL INAUGURATION

The Comptroller General has been requested to provide his opinion on the legality of certain support the Department of Defense (DOD) provided for activities associated with the inauguration of President Ronald Reagan. More particularly, we have been asked whether there was any specific statutory authority for the military to provide 1,120 service personnel as chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities. It was also noted that some members of the Presidential Inaugural Committee were provided with mili-

tary drivers from mid-November 1980 until the end of January 1981. In addition, we were asked to provide any proposals we might have for a statutory remedy, in the event we concluded that there is no specific statutory authority for DOD to provide these kinds of support for Presidential inaugural activities.

FACTS

We requested DOD to provide to us a complete report on its 1981 Presidential inaugural activities, including a full description of the types of inaugural assistance it furnished, as well as the legal basis for that assistance. In its report, DOD states that a total of 11,430 armed forces personnel provided support for activities associated with the 1981 Presidential Inauguration. The report indicates that 1,533 of its personnel were used as military aides (both personal aides and social aides), drivers, and ushers—the types of assistance about which you express the greatest concern. The other DOD personnel involved in the inaugural activities performed a variety of functions, including participating in the inaugural parade, acting as honor and parade route cordons, removing snow, and providing security. In addition, a variety of equipment, supplies and other services were provided by DOD, including logistical and administrative support. DOD inaugural support was coordinated through the Armed Forces Inaugural Committee (AFIC).

PRESIDENTIAL INAUGURAL CEREMONIES ACT

The only statutory provision that specifically authorizes DOD to provide support for inaugural activities is 10 U.S.C. § 2543, the codification of section 6 of the Presidential Inaugural Ceremonies Act, act of August 6, 1956, ch. 974, 84th Congress, 2d Sess., 70 Stat. 1049, 1050. That section provides:

> (a) The Secretary of Defense, under such conditions as he may prescribe, may lend, to an Inaugural Committee established under section 721 of title 36, hospital tents, smaller tents, camp appliances, hospital furniture, flags other than battle flags, flagpoles, litters, and ambulances and the services of their drivers, that can be spared without detriment to the public service.
>
> (b) The Inaugural Committee must give a good and sufficient bond for the return in good order and condition of property lent under subsection (a).
>
> (c) Property lent under subsection (a) shall be returned within nine days after the date of the ceremony inaugurating the President. The Inaugural Committee shall—
>
> (1) indemnify the United States for any loss of, or damage to, property lent under subsection (a); and
>
> (2) defray any expense incurred for the delivery, return, rehabilitation, replacement, or operation of that property.

The type of inaugural assistance covered by this provision is rather limited and primarily of a medical or safety nature. This provision does not authorized DOD to provide the number of personnel and the wide-ranging inaugural support referred to in DOD's report to us.

DOD itself recognized the limited coverage of the provision. In the Executive Summary of the 1977 Armed Forces Inaugural Committee, DOD stated:

> 10 U.S.C. 2543 is the only statutory authority within the United States Code specifically authorizing DOD support of a Presidential Inauguration. It identifies only medical and safety equipment support. Additional inaugural support has traditionally been provided by DOD, though not specifically defined in the statute. Using the limiting language of this statute as a basis, * * * the Special Assistant, Secretary of Defense, understandably had reason to question the legality of all support traditionally provided by DOD. This caused lengthy reviews, frequent discussion and many false starts and stops. Major disruptions resulted. In the end, * * * the discussion was elevated to the U.S. Senate level * * *. To preclude recurrence of this situation, it is strongly recommended that DOD immediately initiate action to propose appropriate legislation to clarify the language and intent of 10 U.S.C. 2543.* * *

In response to DOD's concerns, the Chairman of the Joint Congressional Committee on Inaugural Ceremonies for the 1977 Presidential Inauguration had introduced S. 2839, 96th Congress, to amend the Presidential Inaugural Ceremonies Act, *supra,* to clarify DOD's participation. "Because of the legal questions always accompanying Inaugural support * * *, the Department of Defense supported Senate Bill 2839 * * *." Nevertheless, that bill was not enacted, and DOD now states that "the bill is still needed to avoid the quadrennial questions that prompted this inquiry." Thus there seems to be a consensus of uncertainty about DOD's authority.

DOD has not been alone in struggling with the lack of legal clarity with respect to participation in inaugural activities. The General Services Administration (GSA) in the past experienced inaugural problems similar to those of DOD. Without any explicit authority GSA provided the following assistance in connection with inaugurals:

> 1. Provide office space, office furniture, and telephones for the inaugural committee.
> 2. Provide additional guards for the protection and security of Government property and buildings.
> 3. Make available public toilet facilities in Government buildings along the parade route.
> 4. Make cafeterias and snack bars in Government buildings available to military organizations participating in the parade.
> 5. Establish first-aid stations in Government buildings along or near the parade route.
> 6. Maintain standby work force to deal with building maintenance emergencies (elevator trouble, electrical failures, plumbing leaks, snow removal, etc.).
> 7. Arrange for special window and grounds cleaning at Government buildings along the parade route.
> 8. Construct stands and platforms at Government buildings along the parade route.
> 9. Provide parking space and dispatch services for official parade vehicles.
> 10. Cleanup Government buildings and grounds along parade route following inaugural.

H.R. Rep. No. 1796, 90th Cong., 2d Sess. 2 (1968).

Congress has since explicitly legitimized GSA's participation in inaugural activities by amending the Federal Property and Administrative Services Act. In 1968 Congress added subsection 210(a)(15)

to the Federal Property and Administrative Services Act, as amended, 40 U.S.C. § 490(a)(15), which authorized GSA:

> to render direct assistance to and perform special services for the Inaugural Committee (as defined in section 721 of Title 36) during an inaugural period in connection with Presidential inaugural operations and functions, including employment of personal services without regard to the civil service and classification laws; provide Government-owned and leased space for personnel and parking; pay overtime to guard and custodial forces; erect and remove stands and platforms; provide and operate first-aid stations; provide furniture and equipment; and provide other incidental services in the discretion of the Administrator.

It is with this background that we analyze whether DOD's participation in the 1981 Presidential inaugural events was legally supportable on some basis other than 10 U.S.C. § 2543. Our starting point is the Presidential Inaugural Ceremonies Act, *supra,* now largely codified at 36 U.S.C. §§ 721–730, because it is the primary legislation dealing with Presidential inaugurations. Legally it could well be construed as the exclusive authority for establishing responsibilities related to Presidential inaugurals, since it is the permanent legislation in which Congress attempted to address the whole inaugural process. The statute itself, however, does not explicitly preempt other authorities, and the example of the special legislation for GSA indicates that Congress has not legislated on inaugural matters exclusively through amendments to the Presidential Inaugural Ceremonies Act. Accordingly, we shall not treat the Presidential Inaugural Ceremonies Act, *supra,* as preempting other possible authorities for DOD assistance for Presidential inaugurals, as long as the other more general authorities do not contradict the provisions and policies of the Presidential Inaugural Ceremonies Act. The more general authorities relied on by DOD are the Economy Act and DOD's community relations regulations, each of which is discussed below.

Before addressing the other authorities relied on by DOD, however, at least the major features of the Presidential Inaugural Ceremonies Act should be noted, so that DOD's assistance may be properly evaluated in the context of the provisions of that primary statute.

First, subsection 1(b)(2) of the act, 36 U.S.C. § 721(b)(2), acknowledges that there will be a Presidential Inaugural Committee (PIC) for each Presidential inauguration, and defines it as "the committee in charge of the Presidential inaugural ceremony and functions and activities connected therewith, to be appointed by the President-elect." The statute assumes that the PIC will be a private, non-governmental entity, and gives it substantive and substantial rights. However, it contains no provisions authorizing Governmental financial assistance to the PIC. At the same time, in at least three sections, the Presidential Inaugural Ceremonies Act requires that the PIC indemnify the Government for any loss or damage.[1] As

[1] Section 4 of the act, 36 U.S.C. § 724, provides, in part:
"* * * The Inaugural Committee shall *indemnify and save harmless* the District of Columbia and the appropriate agency or agencies of the Federal Government against any loss or damage to * * * ["any sidewalk, street,

such, the Presidential Inaugural Ceremonies Act implies that the PIC was not expected to receive Federal funds or any assistance from Federal agencies other than as specified.

Section 9 of the act, 36 U.S.C. § 729, reserves to the Joint Congressional Committee on Inaugural Ceremonies (JCCIC) responsibility for inaugural activities at the United States Capitol Buildings or Grounds or other property under the jurisdiction of the Congress. In addition, this section permits the JCCIC to receive, upon its request, any of the services or facilities otherwise authorized by the Presidential Inaugural Ceremonies Act.

Section 6 of the Presidential Inaugural Ceremonies Act, *supra,* which authorizes the limited DOD support to the PIC, is but one isolated provision of this statute, and DOD is but one of the agencies assigned responsibilities. Among other things, the Presidential Inaugural Ceremonies Act does, in addition, explicitly:

> Authorize an appropriation for District [of Columbia] expenses in connection with a Presidential inauguration;
>
> [A]uthorize the Commissioners [now Council of the District of Columbia] to make regulations for the protection of life, health, and property during the "Inaugural period,"* * *;
>
> [A]uthorize the granting of special licenses, [with the approval of the Inaugural Committee,] to persons selling goods, wares, and merchandise on the streets of the District [of Columbia] during such period;
>
> [C]entralize in the Secretary of the Interior (or his designated agent, who might be the Superintendent of National Capital Parks) the authority to grant permits to the Inaugural Committee for the temporary use of public space under the control of the Federal Government outside of the Capitol Grounds;
>
> [A]uthorize the Commissioners [now Mayor of the District of Columbia] to grant permits to the Inaugural Committee for the temporary use of public space under their control; [and]
>
> [A]uthorize the temporary installation [by the Inaugural Committee] of lighting or communication facilities on and over public space; * * *. (Organization modified from original into paragraph structure.)

S. Rep. No. 2645, 84th Congress, 2d Sess. 1 and 2 (1956). See also, H.R. Rep. No. 2611, 84th Congress, 2d Sess. 2 and 3 (1956). Moreover, section 3 of the act, as amended, 36 U.S.C. § 723, specifically authorized funds to be appropriated to the District of Columbia to enable it to:

> * * * provide additional municipal services * * * during the inaugural period, including employment of personal services without regard to the civil-service and classification laws; travel expenses of enforcement personnel, including sanitarians, from other jurisdictions; hire of means of transportation; meals for policemen, fire-

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park, reservation, or other public grounds in the District of Columbia" occupied with the approval of the Inaugural Committee by any stand or structure "for the sale of goods, wares, merchandise, food or drink"] and against any liability arising from the use of such property, either by the Inaugural Committee or a licensee of the Inaugural Committee. [Italic supplied.]

Section 5 of the act, 36 U.S.C. § 725, provides, in part:

* * * No expense or damage from the installation, operation, or removal [by the Inaugural Committee] of * * * temporary overhead conductors or * * * illumination or other electrical facilities shall be incurred by the United States or the District of Columbia, and the Inaugural Committee shall *indemnify and save harmless* the District of Columbia and the appropriate agency or agencies of the Federal Government against any loss or damage and against any liability whatsoever arising from any act of the Inaugural Committee or any agent, licensee, servant, or employee of the Inaugural Committee. [Italic supplied.]

Section 6 of the act, 10 U.S.C. § 2543, provides, in part:

* * * [T]he Inaugural Committee shall *indemnify* the Government for any loss or damage to any * * * ["hospital tents, smaller tents, camp appliances, hospital furniture, ensigns, flags, ambulances, drivers, stretchers, and Red Cross flags and poles" lent to them by the DOD], and no expense shall be incurred by the United States Government for the delivery, return, rehabilitation, replacement, or operation of such equipment. The Inaugural Committee shall give a good and sufficient bond for the safe return of such property in good order and condition, and the whole without expense to the United States. [Italic supplied.]

men, and other municipal employees, cost of removing and relocating streetcar loading platforms, construction, rent, maintenance, and expenses incident to the operation of temporary public confort stations, first-aid stations, and information booths; and other incidental expenses in the discretion of the Commissioners [now Mayor of the District of Columbia] * * *.

Finally, subsection 1(b)(1) of the Presidential Inaugural Ceremonies Act defines the term "inaugural period" as:

* * * the period which includes the day on which the ceremony of inaugurating the President is held, the five calendar days immediately preceding such day, and the four calendar days immediately subsequent to such day. 36 U.S.C. § 721(b)(1).

ECONOMY ACT

Aside from the Presidential Inaugural Ceremonies Act, DOD relies in part on the so-called Economy Act as authority to provide additional support for inaugural events in response to requests of the Presidential Inaugural Committee and the Joint Congressional Committee on Inaugural Ceremonies.[2] Section 601 of the Economy Act, as amended,[3] 31 U.S.C. § 1535,[4] permits one agency or bureau of the Government to furnish materials, supplies or services for another on a reimbursable basis. The PIC is not a Government agency and even if it were, DOD used its own appropriations without reimbursement from either the PIC or JCCIC. Therefore, the authority of the Economy Act is not applicable.

COMMUNITY RELATIONS REGULATIONS

Aside from statutes, DOD relies upon its internal regulations and its traditional ceremonial role of participation in national celebrations and somber state occasions.

DOD's community relations regulations are codified at 32 C.F.R. Parts 237 and 238. The statutory authority listed for them is 5 U.S.C. § 301 (previously codified at 5 U.S.C. § 22) which provides that:

The head of an executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of

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[2] DOD stated its justification for reliance on the Economy Act as follows:
Another legal theory which authorized Department of Defense support to the Inaugural is that much of it was pursuant to the Economy Act (31 U.S.C. 686). Throughout the pre-Inaugural period, the AFIC received requests from the PIC, which is recognized by 36 U.S.C. 721. As an operational principle, the AFIC responded to the PIC as if the PIC were an agency entitled to receive Economy Act assistance. Although this was inconsistent with a 1977 interpretation by the Staff Judge Advocate, Military District of Washington, it was reasonable for the AFIC to provide assistance to the PIC in view of the interrelationship among the JCCIC, PIC, and AFIC. Of course, in 1977 the Special Assistant to the Secretary of Defense expressly approved Economy Act support for the JCCIC, which is recognized by 36 U.S.C. 729.

[3] Section 601 of the Economy Act, as amended, states in part:
(a) Any executive department or independent establishment of the *Government*, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and *shall pay promptly by check* to such Federal agency as may be requisitioned, upon its written request, *either in advance or upon* the furnishing or *performance* thereof, all or part of *the* estimated or *actual cost* thereof as determined by such department, establishment, bureau, or office as may be requisitioned; but proper adjustments on the basis of the actual cost of the materials, supplies, or equipment furnished, or work or services performed, paid for in advance, shall be made as may be agreed upon by the departments, establishments, bureaus, or offices concerned * * * [Italic supplied.]

[4] Pub. L. No. 97-258, approved September 13, 1982, 96 Stat. 877, enacted Title 31 of the United States Code into positive law and renumbered various of its provisions. The Economy Act, cited by DOD as 31 U.S.C. § 686, is now found at 31 U.S.C. § 1535.

its records, papers, and property. This section does not authorize witholding information from the public or limiting the availability of records to the public.

DOD defines "community relations" as "the relationship between the military and civilian communities." 32 C.F.R. § 237.3(a). DOD's policy justifications for the community relations program include recognition that:

> The morale of all personnel of the Department of Defense is affected by the favorable or unfavorable attitudes of the civilian community toward their mission and their presence in the area * * * (32 C.F.R. § 237.4(a)(2).)

and that:

> Active participation of military units and military personnel and their dependents as individuals in civilian activities, organizations, and programs is an important factor in establishing and maintaining a state of mutual acceptance, respect, cooperation, and appreciation between the Armed Forces and civilian communities affected by their operations. (32 C.F.R. § 237.4(a)(3).)

These regulations encompass a broad range of activities, with emphasis on DOD participation in *local* community events. They were not designed to cover events which are national in scope such as a Presidential inauguration and which have little if anything to do with the means by which favorable local community relations are fostered. Nevertheless, an examination of certain aspects of the regulations may be useful for the purpose of developing Presidential inauguration participation policy.

As a general principle, DOD's regulations distinguish between the kind of participation in public events and programs which primarily fosters DOD's own interests and purposes, and participation as one of several interested parties in which the benefits may be said to be mutual. (By necessary implication, if there is only negligible benefit to DOD to be derived from its participation, it should decline the invitation to be part of the event.) DOD may pick up most or all of the costs of its participation in the first category as necessary. For events in the second category, DOD should pay only the proportionate share of the costs directly attributable to the participation of its own personnel.

We will now examine DOD assistance with the 1981 Presidential inaugural activities in the light of these principles.

INAUGURAL CEREMONY

The installation of the President as Commander-in-Chief of the Armed Services is obviously of major interest to the DOD. It is also of major interest to every other Federal entity, as well as to the public at large. In recognition of this shared interest, the Congress established the Joint Congressional Committee on Inaugural Ceremonies (JCCIC) and charged it with the responsibility of making arrangements for the inaugurations of the President-elect and the Vice President-elect. In addition, section 9 of the Presidential Inaugural Ceremonies Act, 36 U.S.C. § 729, reserves to the JCCIC responsibility for inaugural activities at the United States Capitol

Buildings or Grounds or other property under the jurisdiction of the Congress. Consequently, primary responsibility for the arrangements for the Presidential inaugural ceremony, including funding, rests with the JCCIC rather than DOD.

Since DOD also has a clear interest in the event, it may pay for the expenses necessarily incurred by its personnel in participating in the ceremony. This might well include the costs of transporting DOD participants to the ceremony, per diem and other travel expenses of participating, the costs of ceremonial uniforms, flags, etc. It would also include the costs of any services provided to the Presidential Inaugural Committee (PIC) under section 6 of the Presidential Inaugural Ceremonies Act, discussed before. As explained earlier, that type of assistance is rather limited and is primarily of a medical or safety nature.

On the other hand, there appears to be no authority for the provision of what DOD described as "logistical and administrative" support to the JCCIC, nor for the provision of equipment and supplies (unrelated to DOD's own participation needs), all on a non-reimbursable basis. We aso question the use of DOD personnel as ushers for those holding reserved seats for the inaugural ceremony. (Ushers are explicitly listed as inappropriate capacities for service by military personnel in DOD's community relations regulations, 32 C.F.R. § 238.6(b)(4)(iv).) However, it is not our intention now to single out all specific costs which may definitely be allowed and to identify all others which are clearly improper. We are merely discussing the applicable principles under DOD's own community relations regulations, in order to point up the need for more definitive guidance from the Congress.

INAUGURAL PARADE

Participation in this significant national celebration is clearly of great importance and significance to DOD. As was true of the inaugural ceremony, other Federal entities could also regard such participation as being of direct benefit or interest to them. For example, it is conceivable that at some future inaugural, the Departments of Agriculture or Interior might be invited by the PIC to provide a "float" symbolizing their contributions to the nation. Thus, once again we have a "mutual benefit" event, and each agency may incur and pay costs directly attributable to its own participation. As for other costs not so allocable, we note that subsection 1(b)(2) of the Presidential Inaugural Ceremonies Act, 36 U.S.C. § 721(b)(2), charges the PIC with responsibility for Presidential inaugural functions and activities that do not take place at the United States Capitol Buildings or Grounds or on other property under the jurisdiction of the Congress. In addition, that statute does not provide for assistance to the PIC through Federal expenditures, although use of appropriated funds was anticipated by the

District of Columbia government for related functions. Therefore, we conclude that primary responsibility for the Presidential inaugural parade rested with the PIC and not DOD.

Applying this principle, we agree with a January 6, 1977, memorandum (referred to in the materials included in the Congressional submission) from the Assistant Secretary of Defense (Installation and Logistics) to the Assistant Secretaries of the military departments. This memorandum questioned the practice of using military jeeps to pull non-military floats, or to supply military drivers for (non-DOD) VIPS taking part in the parade. Aside from the risks of tort liability, these expenses are not properly attributable to DOD's own needs but are, instead, expenses incurred for the benefit of some other participant.

INAUGURAL BALLS

In defining "official civil ceremonies," DOD's community relations regulations provide:

> * * * Community or civic celebrations such as banquets, dinners, receptions, carnivals, festivals, opening of sports seasons, and anniversaries are *not* considered official civil ceremonies even though sponsored or attended by civic or governmental dignitaries. [Italic supplied.] 32 C.F.R. § 237.7(h).

In addition, these DOD regulations define "Official Federal Government functions" as:

> * * * Those activities in which officials of the Federal Government are involved in the performance of their official duties. 32 C.F.R. § 238.3(a)(3).

An inaugural ball, being akin to a banquet, dinner or reception, would not be regarded as an official civil ceremony. In addition, even though an inaugural ball may be attended by officials of the Federal Government, they are not in attendance in the performance of their official duties, but rather as guests who happen to be officials. Moreover, unlike the inaugural parade, an inaugural ball is not generally available to the community. *See* 32 C.F.R. § 238.6(a)(1)(iii). The inaugural balls have been limited to invitees, in significant part selected by the PIC; admission is by ticket only (usually for a substantial fee); and are basically private gatherings or parties whose proceeds go to the PIC. Therefore, we doubt that any of DOD's costs of participating at inaugural balls, whether incurred for DOD officials or other, constitute official expenses which may be paid from DOD appropriations.

PREINAUGURAL ACTIVITIES

The submission states that certain kinds of DOD assistance were provided to some members of the PIC from mid-November 1980 until the end of January 1981. We recognize the complexities associated with effective coordination and implementation of the various inaugural activities. Therefore, a reasonable amount of planning and preparation by participants is essential. As was true for

all the other inaugural activities discussed before, DOD should only have assumed the costs of planning and preparation for its own participants.

SPECIFIC ASSISTANCE

Much of the assistance reported to us by DOD appears directly related to its own preinaugural needs. There are, however, a number of questionable activities. For example, DOD reports the billeting of high school and university parade participants from outside the National Capital Region in local military installations. In addition, DOD reports:

> e. The Military Aides Subcommittee of the AFIC organized, assigned, briefed, supervised, and assisted aides provided to VIPs during the inaugural period. Two categories of aides were provided. Personal aides were assigned to assist specific VIPs. Social aides were assigned to assist at official inaugural events. A total of 175 personal aides and 329 social aides were utilized.
>
> * * * * * * *
>
> i. The Transportation Subcommittee of the AFIC coordinated the travel and transportation of all Armed Forces elements in connection with the inaugural and operated the inaugural motor pool. This motor pool provided drivers to operate vehicles donated to the PIC for the purpose of providing transportation for AFIC and PIC staff personnel on official business prior to the inaugural and other VIPs during Inaugural week. During the peak period immediately preceding Inaugural day, 671 drivers were utilized.

The use of military personnel as chauffeurs, personal escorts and social aides for nonmilitary personnel cannot be regarded as a cost related to the participation of DOD's own personnel in the inaugural events. Moreover, this type of support does not comply with 32 C.F.R. § 238.6(b)(4)(iii) of DOD's community relations regulations, which provide:

> (b) The Department of Defense does *not* authorize support of community relations programs when * * *
> (4) * * * DOD support:
>
> * * * * * * *
>
> (iii) Consists wholly or in part of resources, facilities, or services which are otherwise reasonably available from commercial sources. [Italic in original.]

We have seen no evidence that adequate, nonmilitary-chauffeured transportation was not reasonably available from commercial sources, such as taxis, buses, subways, and other forms of public transportation, for the use of PIC personnel during the preinaugural period. Similarly, with respect to drivers for the private motor vehicles loaned to the PIC, there appear to be many sources of help in the private sector, if PIC personnel were unable to drive themselves in the preinaugural period, or even in the inaugural period itself.

Similarly, we believe that the services of personal escorts or aides, social aides, and ushers were "reasonably available from commercial sources," and thus were not authorized to be provided by DOD under DOD's community relations regulations.

We find nothing in the materials before us that indicates that military personnel or military skills were peculiarly essential in the performance of the duties assigned to personal aides, social aides, or ushers for the inaugural activities. Thus, we think that personnel for these tasks should have been obtained from commercial sources. See also 32 C.F.R. § 238.6(b)(4)(iv) and 32 C.F.R. § 238.11(f)(ii) of DOD's community relations regulations which list these functions as being inappropriate for DOD personnel.

Even if DOD's community relations regulations did not contain the limitations discussed, we would have reservations about these expenditures. It is fundamental that Federal agencies cannot make use of appropriated funds to supply services (or manufacture products or materials) for private parties in the absence of specific authority therefor, usually specific statutory authority. 34 Comp. Gen. 599 (1955); 31 *id.* 624 (1952); 28 *id.* 38 (1948); B-69238, July 13, 1948. *See also* 31 U.S.C. § 628; *National Forest Preservation Group* v. *Volpe,* 352 F. Supp. 123 (D.C. Mont. 1972), *aff'd. on reconsideration* 359 F. Supp. 136 (D.C. Mont. 1973). In fact, it has been held that the performance of services by Government personnel for non-Federal or private agencies involves an improper use of appropriated funds even where the Government is compensated therefor or reimbursed in kind. 34 Comp. Gen. 599 (1955); 31 *id.* 624 (1952); B-69238, July 13, 1948. *See also* 33 Comp. Gen. 115 (1953). Moreover, "the general rule [is] that it is the sole right of the Government to supervise and control the work and time of performance of its officers and employees engaged in governmental activities," and an agency does not have authority to delegate this responsibility to a non-Federal or private entity. 31 Comp. Gen. 624 (1952).

In any other context besides the Presidential inaugural events, there would be little doubt about the impropriety of using taxpayer funds to provide personal aides, social aides, and drivers for private individuals. While we agree that the application of usual laws and regulations may not seem appropriate for inaugural activities, the current law does not make any special exceptions for agency assistance to the inaugural events, other than as provided in the Presidential Inaugural Ceremonies Act. If assistance would be unlawful and improper generally, it likewise would be unlawful and improper for the inaugural events. Consequently, we conclude that a significant amount of the support provided by DOD for 1981 inaugural activities was without proper legal authority.

CONGRESS

The Executive Summary of the 1977 Armed Forces Inaugural Committee discloses certain DOD inaugural activities in 1977 of questionable legality under the standards discussed above, and akin to those of concern in the 1981 inaugural. However, many of these DOD actions were apparently undertaken with the knowl-

edge, active involvement and approval of key members of Congress. DOD stated in its response to our letter of inquiry that Congress had "full knowledge of past practices because Congressional members themselves have participated in the events." However, the mere fact that an activity has been disclosed to the Congress and has not been objected to does not necessarily require the conclusion that it was thereby legally authorized. B-69238, July 13, 1948.

We note that the House Committee on Government Operations, when acting upon GSA's request for inaugural legislation which was discussed above, stated:

> The inauguration of a President of the United States is a principal event in our democratic society. It symbolizes the major attribute of a governmental system based on laws rather than on men: the orderly transfer of the powers of the highest office in the land.
>
> Millions of Americans are present on this ceremonious occasion, either in person or through the medium of television, and their presence gives further affirmation and legitimacy to the democratic process.
>
> The spectacle of an inauguration requires a great deal of planning as well as financing to accommodate the public and to insure that the event is as memorable in execution as it is in significance. * * *

H. Rep. No. 1796, 90th Cong., 2d Sess. 2 (1968).

We agree with these statements. However, we are not confident that existing law, agency practices and Congressional oversight are adequate to provide necessary guidance to agencies on permissible and impermissible inaugural activities and their funding.

RECOMMENDATION

We recommend that Congress undertake a review of the provisions of the Presidential Inaugural Ceremonies Act for the purpose of conforming its provisions to recent practices with respect to Government support of inaugural activities or, in the alternative, prohibiting the practices that do not conform with the law. In this review, we suggest that special attention be given the issues of:

(1) which inaugural functions should properly be funded by the American taxpayers and which by the President-elect and Vice President-elect's supporters from private funds;

(2) whether formal governmental representation on the Presidential Inaugural Committee might be appropriate, if the Government is to bear any substantial costs for inaugural activities;

(3) whether Government funding should vary depending on the inaugural activity, i.e., pre-inaugural planning and preparation, formal inaugural ceremony, inaugural parade, and inaugural balls; and

(4) DOD's appropriate role in inaugural activities in light of the current trend of increasing DOD's responsibilities for such activities as contrasted with the Presidential Inaugural Committee, the Joint Congressional Committee on Inaugural Ceremonies, the Government of the District of Columbia, and the Department of the Interior.

Until these basic policy issues are resolved, we are reluctant to propose any specific statutory language. However, we shall be glad to work with Congress in a review of the provisions of the Presidential Inaugural Ceremonies Act and in offering any other assistance that may be requested in devising a legislative solution to the problems identified above.

[B-211213]

Payments—Quantum Meruit/Valebant Basis—Absence, etc. of Contract—Government Acceptance of Goods/Services

When goods are furnished or services rendered to the Government, but the contract provision under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or services under an implied contract.

Set-Off—Contract Payments—Recovery of Overpayments

Procuring agency should attempt to recover payments that are in excess of the fair and reasonable value of services rendered under illegal contract provision. This can be done by setting off overpayments against any other amounts due the contractor, and may be done any time up to 10 years in appropriate circumstances.

Matter of: The Department of Labor—Request for Advance Decision, April 21, 1983:

The Department of Labor requests our opinion concerning three task order contracts for architect-engineering management services provided to the Job Corps. The contracts, all of which extend to September 30, 1983, contain provisions that the agency believes constitute a cost-plus-a-percentage-of-cost system of contracting.

We agree that the provisions violate the prohibition contained in 41 U.S.C. § 254(b) (1976) against this system of contracting, and we recommend that the Department of Labor attempt to recover any improper payments made under these contracts.

The contracts, with ceiling amounts, are as follows:

The Leo Daly Company	$9,568,858
FACE Associates, Inc.	2,350,000
Environmental Management Consultants	9,155,000

In each, the Government has agreed to pay the contractor certain per-day rates for certain classes of employees who will provide field and office support. These rates, the contracts state, include salaries and wages, overhead, G&A, and profit.

In addition, the Daly and FACE contracts contain a provision permitting the contractor to add a percentage of costs to certain expenses. They state:

> A maximum of * * * 7.5 percent of basic costs shall be added by the contractor on all materials, subcontracts, travel, and other expense items to cover overhead and profit. A maximum markup of 5 percent will be added for all expenses that are not supervised and/or subcontracted for by the contractor.

The Environmental Management contract is identical except that it provides for a maximum markup of 10 percent of basic costs.

The Department of Labor states that it now is taking action to delete the provision from the three contracts, and is attempting to negotiate a settlement of costs incurred thus far on a *quantum meruit* basis, with recovery of unearned profits. The agency asks whether additional legal or administrative actions are necessary.

The usual guidelines applied by our Office in determining whether a contract constitutes a cost-plus-a-percentage-of-cost system of contracting are (1) whether payment is at a predetermined rate; (2) whether this rate is applied to actual performance costs; (3) whether the contractor's entitlement is uncertain at the time of contracting; and (4) whether it increases commensurately with increased performance costs. *Department of State—Method of Payment Provisions,* B-196556, August 5, 1980, 80-2 CPD 87. The provision quoted above appears to fall within these guidelines, and the presence of a ceiling on costs does not save it from violating the statute. See *Federal Aviation Administration—Request for Advance Decision,* 58 Comp. Gen. 654 (1979), 79-2 CPD 34.

In our opinion, that portion of the contract containing the markup provisions is therefore void. We believe, however, that the portion providing for payment of wages at specific daily rates, including overhead and profit, is still valid. In other words, the contract is divisible into a legal portion, supported by valid consideration, and an illegal portion invalid because the method of payment specified is contrary to statute. *See* Calmari and Perillo, Contracts, § 384, Divisibility of Illegal Bargains (1970); 6A Corbin on Contracts § 1528 (1962).

If the Job Corps needs architect and engineering management services between now and September 30, 1983, as it informally advises us it does, it must modify the contracts by deleting the illegal payment provisions and in each case negotiating a fixed fee that the contractor will be paid in addition to his direct costs for the expenses covered by the provision. The Department of Labor advises us that it is preparing a new procurement, and that the cost-plus-a-percentage-of-cost payment provisions will not be included in contracts for similar services in fiscal 1984.

As for payments already made, the courts and our Office have recognized that when goods are furnished or services rendered, but the contract under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or serv-

ices on an implied contract for *quantum meruit* or *quantum valebat. Federal Aviation Administration, supra; Marketing Consultants International Limited,* 55 Comp. Gen. 554, 564 (1975), 75-2 CPD 384.

Therefore, if the contracting officer determines that the amounts already paid were fair and reasonable, and the Government has received a benefit, payments to date may be considered proper. Overpayments, if any, may be considered during negotiation of the fixed fee, as outlined above. If they cannot be recaptured in this manner, the Department of Labor should attempt to recover any payments that it considers in excess of the fair and reasonable value of services rendered by setting them off against any other amount owed to the contractors by the Government.

The statute of limitations, 28 U.S.C. § 2415 (1976), would prevent court action to recover overpayments after 6 years. However, legislation enacted late in the 97th Congress makes it clear that in appropriate circumstances outstanding claims may be recovered by means of administrative setoff for up to 10 years. *See* 31 U.S.C. § 3716, as adopted by Pub. L. 97-452, 96 Stat. 2471, (1983). Nonetheless, the Department Labor should seek recovery as expeditiously as possible.

[B-207731]

Debt Collections—By Government Employees Requirement

Collection of fees owed the United States is an inherent governmental function which may be performed only by Federal employees.

Debt Collections—By Government Employees Requirement—Collection by Non-Employees—System for Protection of Government—Feasibility Questionable

General Accounting Office questions the feasibility of developing a system of alternative controls to protect the Government against loss in the event that volunteers collect Government monies.

Matter of: Collection of Recreation User Fees by National Forest Volunteers, April 22, 1983;

The Secretary of Agriculture has requested our opinion on whether individuals who are designated for public volunteer service pursuant to the Volunteers in the National Forests Act of 1972 may collect camping fees and similar types of recreation user fees owed the United States. The submission notes that before using volunteers for this purpose, the Department of Agriculture plans to develop proper guidelines and procedures to assure the security of public funds. We cannot approve the proposal since the collection of fees owed the United States is, in our view, an inherent governmental function which may be performed only by Federal employees. Furthermore, as will be explained below, we question the

feasibility of developing alternate controls to assure the security of funds collected.

The submission notes that about half of the 2,000 National Forest campgrounds are currently staffed by a campground host serving as a volunteer under the authority of the Volunteers Act. Most of the campground hosts, we are told, are middle-aged, mature persons who have led responsible lives and can be trusted to perform their job in accordance with the agreement signed by them and the unit manager. Fee collection is largely dependent upon the good faith of campers using the campgrounds, who are expected to deposit their payments in a locked box, which is emptied periodically by a Forest Service employee. The Forest Service anticipates that the presence of a campground host who collects fees will increase payment compliance among campers, as well as decrease the opportunity for vandalism of the collection boxes.

The Volunteers in the National Forests Act of 1972, Public Law 92-300, codified at 16 U.S.C. §§ 558a-d, authorizes the use of volunteers "for or in aid of interpretive functions, visitor services, conservation measures and development, or other activities in and related to areas administered by the Secretary [of Agriculture] through the Forest Service." Neither the Act itself nor the committee reports (Senate Report No. 92-696 and House Report No. 92-982) authorize the use of volunteers to collect fees. The House report describes the functions to be performed by the volunteers as follows:

> The duties of the volunteers would include providing special information services to visitors, assisting at historical and special events, increasing the availability of interpretive programs, providing special skills, training volunteers in specialized cases, assisting in special research projects such as historical research of a ghost town, writing brochures on trees, plants, birds, and mammals or other features of interest, working on special projects, and teaching special subjects. H. Rpt. No. 92-982, 1972 U.S. CODE CONG. & AD. NEWS 2298-9.

Although the use of volunteers for collection purposes is not explicitly prohibited in either this enumeration of volunteer activities or in the language of the Act itself, it is clear that fee collection was not a function that Congress had in mind when it enacted the Volunteers Act.

When asked by the Forest Service whether non-employees could be designated as agents of the Government to perform limited collection duties, the Department of Agriculture's Office of General Counsel noted that OMB Circular A-76, March 29, 1979, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government," defined governmental functions which were required to be performed in-house "due to a special relationship in executing governmental responsibilities" as including "monetary transactions and entitlements." Agriculture's legal staff expressed the opinion that the contracting out of the collection function was thus precluded, and that, by analogy, "the delegation of such function outside the Department to a non-employee would

appear to be inappropriate." We agree. The handling of public funds, exemplified in this case by the collection of fees owed to the United States, is an inherent governmental function which must be performed by Government employees.

Further support for this conclusion may be found in the legislative history of a "companion statute," the Volunteers in the Parks Act of 1969, 16 U.S.C. § 18g. In reporting on this legislation, the Senate Committee on Interior and Insular Affairs noted that the intent of the legislation was to authorize the use of volunteers, for example, to "help to provide special information, services to visitors, assist in archeological digs, conduct special research, or help in the interpretation of historical events." The Committee emphasized that the legislation was not intended to authorize the use of volunteers "to do the jobs normally assigned to regular career employees." S. Rep. No. 91-1013 (to accompany H.R. 12758), reprinted in 1969 U.S. CODE CONG. & AD. NEWS 3579, 3580. In our view, handling public funds is a function that should always be assigned to employees.

Agriculture's legal staff also pointed out that employees charged with the safekeeping of public monies are personally accountable for funds entrusted to them, and that if a deficiency occurs, there are statutorily imposed penalities and remedies by which the Government may recover the funds. Non-employees, in contrast, would not be subject to strict accountability under any existing law, and in the event of a non-employee's withholding of funds, the Government's only remedy would be to seek a judgment in the courts.

The Forest Service responded to these concerns by specifying that the following conditions would need to be satisfied before the responsibility of collecting fees would be assigned to non-employees:

(1) The volunteer must secure a surety bond from a Federally approved bonding institution.

(2) The vounteer must agree to be strictly accountable for any deficiency in funds of the United States entrusted to him or her.

(3) The volunteer must understand and agree to the directions, policies, and procedures pertaining to the collection of campground fees (currently set forth in the Forest Service's Collection Officer Handbook).

Although the imposition of strict accountablility on the volunteer, coupled with the requirement that he or she obtain a surety bond payable in the event of either a negligent or a non-negligent loss, would provide adequate assurance that U.S. funds are secure, we have doubts as to be feasibility of obtaining such bonds. We also have reservations about subjecting a volunteer to the sort of potential liability to which he or she would be subject under such strict liability guidelines.

As we pointed out in discussions with Forest Service officials, making a volunteer strictly accountable for funds entrusted to him

or her does not necessarily place the volunteer on equal footing with Government employees to whom funds have been entrusted. Although accountable officers of the Government are strictly liable for funds in their possession, the GAO has statutory authority to relieve the officers of such liability under certain circumstances. For example, 31 U.S.C. § 3527(a) (formerly 31 U.S.C. § 82a-1) authorizes this Office to relieve an accountable officer of liability for physical loss or deficiency of Government funds if we agree with the determination of the agency (1) that the loss or deficiency occurred while the officer or agent was acting in the discharge of his official duties, or by reason of the act or omission of a subordinate of the officer or agent; and (2) that the loss or deficiency occurred without fault or negligence on the part of the officer or agent. It is not clear, however, that we would have statutory authority to relieve volunteers for losses which are not attributable to their own fault or negligence.

This in turn means that 31 U.S.C. § 3527(d), which permits the adjustment of the account of an official or agent who is granted relief, would not apply. In order to protect the Government against the possibility of loss, volunteers would accordingly need to obtain bonds which would indemnify against non-negligent losses as well as those caused by the volunteer's negligence. It is unclear to us that such coverage may be obtained at a cost which a volunteer would be willing to bear.

Moreover, it must be recognized that the sort of bonds which Federal employees obtained prior to the enactment of Public Law 92-310, June 6, 1972, 31 U.S.C. § 9302 (formerly § 1201), did not protect the bonded employee personally. A bonding company which made good a loss to the Government was entitled to proceed against the bonded employee to recover from him or her the amount paid. *See, e.g.,* B-186922, April 8, 1977. Thus, under any proposal to use volunteers in this manner, the volunteers could find themselves held personally liable for losses occurring during the course of their service, even where they had obtained surety bonds. This is another consideration which causes us to question the feasibility of the Forest Service's proposal, even if it were otherwise acceptable.

In conclusion, we cannot approve the Forest Service's proposal that volunteers be used to collect recreation user fees owed the United States since:

(1) there is no indication that Congress intended that volunteers would perform such a function;

(2) fee collection is an inherent governmental function which may be performed only by Government employees; and

(3) in order to protect the Government fully against loss, volunteers would need to obtain surety bonds payable in the event of both negligent and non-negligent losses, and it is not clear that

such bonds are available at a cost that either the agency[1] or the individual volunteer would be willing to bear.

[B-208220]

Compensation—Backpay—Retroactive Promotions—Computation

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e-16(b). Under regulations implementing sec. 2000e-16(b), set forth in 29 C.F.R. 1613.271(b)(1), back pay must be computed in the same manner as if awarded pursuant to the Back Pay Act, as amended, 5 U.S.C. 5596, and its implementing regulations set forth in 5 CFR 550.805. The standards for computing back pay must be applied in light of the make-whole purposes of 42 U.S.C. 2000e-16(b).

Compensation—Backpay—Retroactive Promotions—Computation

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e-16(b). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against back pay since such an offset would contravene the make-whole purposes of 42 U.S.C. 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded.

Matter of: Ladorn Creighton—Backpay, April 22, 1983:

Edward J. Obloy, General Counsel of the Defense Mapping Agency (DMA), requests a decision as to whether a cash award granted to Mr. Ladorn Creighton under the Employee Incentive Awards Act, 5 U.S.C. §§ 4501-4507 (1976 & Supp. IV 1980), during the period he was discriminatorily denied a promotion, must be offset against the backpay which he was awarded under 42 U.S.C. § 2000e-16(b) (1976 & Supp. III 1979). We hold that a cash award granted to an employee during the period of a discriminatory personnel action should not be offset against backpay since such an offset would contravene the make-whole purposes of 42 U.S.C. § 2000e-16(b). Moreover, once an incentive award is granted in accordance with 5 U.S.C. §§ 4501-4507, and implementing regulations in 5 C.F.R. Part 451 (1982), the recipient acquires a vested right to the amount awarded.

On April 20, 1982, DMA determined that Mr. Creighton, a grade GS-12 Supervisory Cartographer, had been denied a promotion to the position of Supervisory Cartographer, grade GS-13, in violation of the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. § 2000e-16, and consequently awarded him a retroactive promotion effective August 10, 1979. In computing the employee's backpay under 5 U.S.C. § 5596, a question arose as to whether a $500 incentive award granted to Mr. Creighton on October 23, 1980,

[1] A Forest Service representative had informally asked that we include a discussion of the availability of agency funds to purchase the surety bonds. In view of the conclusions in the text, it is not necessary to address this issue.

in recognition of his sustained superior performance of assigned duties during the period October 10, 1979, to October 10, 1980, should be deducted from backpay in view of the provision of the Back Pay Act which requires deduction of "any amounts earned by the employee through other employment" during the period of the discriminatory action. Pending resolution of this issue by our Office, DMA is withholding $500 from the backpay awarded Mr. Creighton.

Section 2000e-16(b) of Title 42, United States Code, provides make-whole remedies, including backpay, for an employee of the Federal Government who is found to have undergone a discriminatory personnel action based on race, color, religion, sex, or national origin. Under regulations implementing section 2000e-16(b), set forth in 29 C.F.R. § 1613.271(b)(1), backpay is to be computed in the same manner as if awarded pursuant to the Back Pay Act and its implementing regulations. See generally, B-180021, March 20, 1975. Section 550.805(e) of Title 5, Code of Federal Regulations, implementing the Back Pay Act, provides that, in computing the amount of backpay under 5 U.S.C. § 5596, an agency shall deduct "[a]ny amounts earned by an employee from other employment during the period covered by the corrective action."

The standards for computing backpay awarded under 42 U.S.C. § 2000e-16(b), as defined by 5 C.F.R. § 550.805(e), must be applied in light of the remedial purposes of section 2000e-16(b). Specifically, we note that the Equal Employment Opportunity Act was intended to eradicate discrimination in the Federal Government and to make the victim of discrimination whole by restoring him to the position he would have occupied had the discrimination not occurred. See *Association Against Discrimination* v. *City of Bridgeport,* 647 F.2d 256, 278 (1981), and cases cited therein; and *Hackley* v. *Roudebush,* 520 F.2d 108, 136 (1975).

In keeping with the foregoing principles, we hold that the amount of the award received by Mr. Creighton for superior performance in grade GS-12 need not be deducted from backpay. Deduction of the award would allow the discriminating agency both to benefit from the employee's superior performance in the grade from which he had been denied promotion and to subtract from backpay the award recognizing such performance. Clearly, such a result would contravene the remedial policies underlying the Equal Employment Opportunity Act.

Moreover, we note that, while the granting of an incentive award is discretionary with the employing agency, the recipient of an award duly granted under 5 U.S.C. §§ 4501-4507, as implemented by the provisions of 5 C.F.R. Part 451, acquires a vested right to the amount awarded. See *John J. Kelly,* B-204724, September 13, 1982, and *Lawrence J. Ponce,* B-192684, November 19, 1979. Since there is no evidence that the $500 cash award was granted to Mr.

Creighton in violation of the awards statute or its implementing regulations, the employee is entitled to retain the award.

In view of the foregoing, we hold that the $500 award received by Mr. Creighton during the period of the discriminatory personnel action may be retained by him without offset against the backpay to which he has been determined to be entitled under 42 U.S.C. § 2000e-16(b).

[B-209070]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Date Basis of Protest Made Known to Protester

Two grounds of protest against application of Buy American Act evaluation factor are timely when filed within 10 working days of when the protester learns of basis of protest. Final ground of protest is untimely filed but will be considered under significant issue exception to Bid Protest Procedures.

Buy American Act—Bids—Evaluation—Foreign Country Classification—Not Prejudicial to Protester

Protester was not prejudiced by classification of foreign countries involved in Buy American evaluation of bids submitted for requirement of hexachlorethane.

Buy American Act—Bids—Evaluation—Domestic Product Proposed—Responsibility Determination—Not Required

Protest that Buy American Act evaluation should not have been conducted because sole domestic bid, which was not low, was, allegedly, bogus is rejected. Bogus charge relates to allegation concerning domestic bidder's alleged nonresponsibility. But Buy American regulatory scheme does not require responsibility determination of domestic bidder in this situation. Moreover, General Accounting Office does not consider that a responsibility determination need be made absent collusion or other extraordinary circumstances not present in this procurement. Finally, domestic bid contained no indication that it was other than domestic.

Buy American Act—Bids—Evaluation—Inapplicability of Buy American Act Evaluation Factor—Quantities on Which Only Foreign Bids Submitted

Sole domestic bidder submitted bid for quantity which was less than maximum specified in Invitation For Bids (IFB). Partial bid was authorized by IFB. Contracting officer applied Buy American Act evaluation factor against nondomestic bidder as to maximum quantity which nondomestic bidder bid on. Application of evaluation factor as to quantities on which domestic bidder submitted partial bid was proper. Application of evaluation factor as to quantities on which only foreign bids were submitted was improper. Partial termination of contract is recommended.

Matter of: Cal Capital Exports, April 22, 1983:

Cal Capital Exports (Cal Capital) protests an award by the Department of the Army, Materiel Development and Readiness Command (Army), to ICI Americas Incorporated (ICI) under invitation for bids (IFB) DAAA03-82-B-0039 for 1,413,025 pounds of hexachloroethane. The IFB also provided that bidders could bid on lesser quantities and that the Army reserved the right (unless the bidder specified otherwise) to award for a quantity less than that bid at the same unit price bid for the higher quantity.

Cal Capital protests the application of a Buy American Act evaluation factor to its low bid. Specifically, Cal Capital contends that: (1) there was confusion in classifying Brazil and the United Kingdom for Buy American purposes; (2) the sole domestic bid was not for consideration because the domestic bidder cannot satisfactorily manufacture the product; and (3) a proper Buy American evaluation would have resulted in multiple awards because the sole domestic bidder submitted a partial bid.

The protest is sustained in part and denied in part.

The following bids were submitted at bid opening:

Quantities	Bid Price (pounds)	Source
Cal Capital—1,413,025 pounds	$0.457/lb	Brazil.
ICI—1,413,025 pounds	.60/lb	United Kingdom.
Rhone-Poulenc—720,000 pounds	.60/lb	France.
Diamond Shamrock—min. 480,000, max. 960,000.	.67/lb	United States.

Defense Acquisition Regulation (DAR) § 6-104(b)(1) (Defense Acquisition Circular (DAC) No. 76-25, October 31, 1980) requires that an evaluation factor be added to a "nonqualifying country offer." The contracting officer determined that Cal Capital's bid was a nonqualifying offer and Diamond Shamrock's bid was a domestic offer. A 50-percent evaluation factor was added to Cal Capital's bid, raising the bid to $0.0086 per pound higher than Diamond Shamrock's bid. No evaluation factor was added to ICI's bid because it was a "qualifying country offer." ICI therefore became the low, evaluated bidder and was awarded a contract for all 1,413,025 pounds.

The Army contends that the first two grounds of the protest are untimely because they were filed with our Office on September 15, 1982, or more than 10 working days after Cal Capital was advised on August 30 that award would be made to ICI. We disagree. A protest must be filed within 10 working days after the protester knows of the basis of protest. 4 C.F.R. § 21.2(b)(2) (1983). Cal Capital insists that the Army did not "clarify" its position on the reasons for the award until September 10. The Army has not questioned this position. The company's September 15 protest, therefore, was timely. As to the final ground of protest, which was filed on December 2, 1982, we find it to raise a significant issue, as discussed below.

Cal Capital states that it undertook to determine if the Army properly evaluated bids. In response to its request for a list of *qualifying* countries, the Army sent a list of "*designated* countries under the Trade Agreement Act" [italic supplied]. Cal Capital argues that the fact that it was provided the wrong list indicates that the contracting officer may have improperly determined that the United Kingdom is a qualifying country and Brazil is a nonqualifying country.

The Army has provided a detailed response to Cal Capital's charge that it was prejudiced by the classification of the countries involved. We cannot question that response, which is:

> * * * For evaluation purposes under DAR 6-104.4, a "qualifying" country is defined by DAR 6-001.5(d) to be any country defined in 6-001.5(a), (b) or (c), to be a Defense Cooperation Country listed in DAR 6-1504, FMS/Offset Arrangement Country, listed in DAR 6-1310.1, or a Participating NATO Country listed in DAR 6-1401, respectively. The inference mandatorily is that all other countries are "nonqualifying" countries. The United Kingdom is listed in DAR 6-1401 as a Participating NATO Country and thus is a "qualifying" country per DAR 6-001.5(c) and (d). Brazil is not listed in either DAR 6-1504 as a Defense Cooperation Country, in DAR 6-1310.1 as a FMS/Offset Arrangement Country, or in DAR 6-1401 as a Participating NATO country, thus Brazil is a "nonqualifying" country. The conclusion is that the bid of ICI, which * * * offered a product from England, was correctly evaluated as a "qualifying" country. On the other hand, the Protester's bid, which * * * offered a product from Brazil, was correctly evaluated as a "nonqualifying" country.
>
> * * * [T]he Contracting Officer provid[ed] the Protester a list of designated countries under the Trade Agreements Act of 1979 as implemented by DAR 6-1601 and DAR 6-1602. DAR 6-1601 establishes designated countries from which bids on eligible products over $196,000 are to be evaluated without regard to the restrictions of the Buy American Act. * * *
>
> It is merely noted that even under the Trade Agreements Act of 1979, Brazil was not a designated country for which waiver of the Buy American Act is authorized. On the other hand, the United Kingdom is [also] entitled to the benefits of being a designated country and bidders offering eligible English products in an amount over $196,000 would be entitled to waive the provisions of the Buy American Act.

Thus, we deny this ground of protest.

DAR § 6-104.4, *supra,* requires that in the absence of a domestic bid, foreign bids shall be evaluated on an equal basis. Cal Capital contends that Diamond Shamrock is not currently producing hexachloroethane and cannot satisfactorily manufacture it. Thus, Cal Capital contends that this alleged circumstance should mean that there was no bona fide domestic bid.

In effect, Cal Capital is arguing that Diamond Shamrock is not a bona fide domestic bidder because the company is, allegedly, incapable of furnishing the item sought. The contracting officer responds, in effect, that he was not required to make a formal determination of Diamond Shamrock's responsibility since the company's bid was not low and, in any event, he had no reason to question the company's responsibility. Specifically, the contracting officer states that Diamond Shamrock "does produce [the chemical sought] as a byproduct of other manufacturing" and that the company provided acceptable samples of the chemical to Pine Bluff Arsenal 2 years ago.

In our view, the evaluation scheme contemplated by DAR § 6-104.4, *supra,* does not require that the responsibility of the sole domestic bidder, who is not low, be assessed for Buy American purposes. Moreover, we do not consider that an assessment need be made absent evidence of collusion or other extraordinary circumstances, which are not present here. Diamond Shamrock submitted a responsive domestic bid because it excluded no end product from its Buy American certificate and did not otherwise indicate that it was bidding a foreign end product. See *Fordice Construction Company,* B-206633, April 30, 1982, 82-1 CPD 401. Therefore, we cannot question the Army's view that Diamond Shamrock was a bona fide domestic bidder.

Cal Capital's final ground of protest is that the evaluation was improper because Diamond Shamrock submitted a partial bid on less than the entire quantity sought. The Army notes that partial bids were acceptable because they were not prohibited and clause 10 of standard form 33A, as noted above, provided that, "unless otherwise provided in the schedule, offers may be submitted for any quantities less than specified." However, Cal Capital's comments filed on December 2, 1982, on the Army's report reveal that Cal Capital is not disputing that partial bids were acceptable. Rather, Cal Capital is protesting that the evaluation factor should not be applied against Cal Capital on those quantities that Diamond Shamrock did not bid. Diamond Shamrock bid on a minimum of 480,000 pounds and a maximum of 960,000 pounds. Cal Capital concedes that if its first two grounds of protest are without merit, ICI is the low, evaluated bidder on the first 480,000 pounds. However, Cal Capital contends it is unclear whether Diamond Shamrock submitted a "firm offer" on quantities between 480,000 and 960,000 pounds because Diamond Shamrock referred to a "minimum" and "maximum." Cal Capital argues that the Buy American differential, therefore, may be inapplicable on these quantities. Finally, Cal Capital argues that the differential is clearly inapplicable as to quantities in excess of 960,000 pounds on which Diamond Shamrock did not bid.

The Army contends this argument is untimely because it was not clearly raised in Cal Capital's initial protest letter but, rather, filed more than 2 months after the initial protest. Cal Capital's initial protest contained the following:

> Diamond Shamrock neither currently produces Hexachloroethane nor submitted a bid for the total amount. Instead, Diamond-Shamrock could "implement production if required," and submitted a partial bid based on their facilities. Therefore, we conclude that there was indeed no domestic commercial producer at the time of bidding, and that our bid should not have been disqualified based on these facts.

While this statement arguably refers to the argument contained in Cal Capital's December 2 comments, we agree with the Army that the argument should have been more clearly raised in the initial protest. However, the evaluation, under DAR § 6-104.4, of nonqualifying offers competing against partial domestic bids, is a novel issue which has not previously been considered by our Office. We consider the Army's interpretation of DAR § 6-104.4 to be erroneous. Our resolution of this issue would be of widespread interest to the procurement community because it would clarify the proper application of DAR § 6-104.4. This issue, therefore, can be considered under the significant issue exception (*see* 4 C.F.R. § 21.2(c) (1983) of our Bid Protest Procedures).

We find no basis for Cal Capital's contention that Diamond Shamrock did not submit a "firm offer" on quantities between 480,000 and 960,000 pounds. Diamond Shamrock's bid was clear; it bid on a minimum of 480,000 and maximum of 960,000 pounds. Partial bids were acceptable. There was, therefore, nothing improper with Diamond Shamrock setting minimum and maximum limitations.

As to the first 960,000 pounds, the contracting officer properly applied the evaluation factor to Cal Capital's bid. The Buy American Act evaluation factor is applied for the benefit of domestic bidders. Diamond Shamrock bid on the first 960,000 pounds and is entitled to the benefit of the evaluation factor. However, it did not bid on quantities in excess of 960,000 pounds. While DAR § 6-104.4, *supra,* does not refer to partial bids, it clearly provides in example "G" of that regulation that the evaluation factor is inapplicable when there is no domestic bid. We conclude that the evaluation factor should not have been added to Cal Capital's bid on quantities on which Diamond Shamrock did not bid. If ICI had not bid, the Army would have awarded 960,000 pounds to Diamond Shamrock and 453,025 pounds to Cal Capital. ICI is certainly not entitled to a larger contract than Diamond Shamrock would have received under those circumstances. In this case, the Army should have made a multiple award—the first 960,000 pounds to ICI at $0.60 per pound and the remaining 453,025 pounds to Cal Capital at $0.457 per pound. This ground of protest is sustained.

The delivery schedule indicates that a delivery of 240,000 pounds is to be made on June 1, 1983, and a final delivery of 240,000 pounds is to be made on July 1. It is our understanding that ICI will not place orders for these deliveries until about 1 month before the delivery dates. It therefore appears that the expense and impact upon the agency resulting from a partial termination of ICI's contract as to 453,025 of the final 480,000 pounds would be minimal. Accordingly, we recommend a partial termination of the contract for the convenience of the Government. We further recommend that a contract for 453,025 pounds be awarded to Cal Capital

if it is still willing to deliver at $0.457 per pound and if the company is otherwise considered still to be eligible for award. If not, the contract with ICI need not be disturbed.

Since our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to those committees concerning action taken with respect to our recommendation.

[B-209073]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—With Dependent Rate—Child Support Payments by Divorced Member—Both Parents Service Members—Dual Payment Prohibition for Common Dependents

Where two married Air Force members with common dependents subsequently divorce, only one member may receive basic allowance for quarters based on the children as dependents, unless the class of common dependents is divided by separation agreement or court order. The member paying child support, which is stated to be on behalf of one child but is sufficient to qualify for entitlement under the applicable regulation, is entitled to the basic allowance for quarters at the with dependents rate while the member having custody of the children receives the allowance at the without dependents rate.

Matter of: Joanne M. Haag, USAF, April 22, 1983:

This action is in response to a request for an advance decision from the Accounting and Finance Officer, 47th Flying Training Wing, Laughlin Air Force Base, Texas. The request has been assigned Control Number DO-AF-1408 by the Department of Defense Military Pay and Allowance Committee.

The question for our determination is whether two divorced Air Force members are both entitled to an increased basic allowance for quarters when one member has custody of the couple's two children and the other member pays child support only on behalf of one child. Currently only the member paying child support receives the quarters allowance at the increased "with dependents" rate. The member with custody of both children is now seeking the quarters allowance at the with dependents rate on account of the child not claimed as a dependent by the former spouse. It is our view that only one member may receive an increased quarters allowance on behalf of common dependents who are all in the custody of one parent. In accordance with existing regulations the member paying child support is entitled to the increased allowance while the member with custody receives basic allowance for quarters at the without dependents rates.

The submission also asks whether our answer would differ if the couple were legally separated rather than divorced. It would not. *Matter of Doerfer,* B-189973, February 8, 1979.

Air Force member, Joanne M. Haag, requested an increased quarters allowance upon the finalization of her divorce from Air Force member Gerald L. Haag. Under the divorce decree, Ms. Haag was granted custody of the couple's two children. Mr. Haag was ordered to pay $200 in child support on behalf of one of the two children. Ms. Haag is not disputing Mr. Haag's entitlement to the quarters allowance at the with dependents rate but is instead claiming that she is also entitled to the increased allowance on behalf of the child for whom she receives no support and whom Mr. Haag does not claim as a dependent for quarters allowance purposes.

Under the provision of 37 U.S.C. 403 a member entitled to basic pay is also eligible for quarters allowance unless provided with adequate Government quarters. Two rates of the allowance are the with dependents and without dependents rates. This allowance is intended to partially reimburse a member for the expenses of providing quarters for himself and his dependents when Government quarters are not furnished. 60 Comp. Gen. 399 (1981).

Paragraph 30236a of the Department of Defense Military Pay and Allowances Entitlements Manual deals with cases involving members who were married but are subsequently divorced and have dependents of the marriage. These provisions generally provide that a member paying child support to the member with custody of the child is entitled to the increased quarters allowance if the support payments are equal to or greater than the difference in that member's with and without dependents rates of the allowance. The member with custody of the child can only claim the increased allowance if the other member declines to claim the child as a dependent for quarters allowance purposes. The eligibility of the member having custody to claim the child for such purposes is not diminished because the member paying support is receiving an increased allowance on account of other dependents.

In effect, the two members have attempted to divide their class of common dependents and each member now claims one child to qualify for the increased allotment. However, the term "other dependents" as used in paragraph 30236a refers to dependents not common to the two members. See 60 Comp. Gen. 399 and B-189973, February 8, 1979. Moreover, in the usual situation a claim for quarters allowance at the with dependents rate on the basis of one child constitutes a claim for an entire class of common dependents. B-189973, February 8, 1979.

The term dependent as used in 37 U.S.C. 403 (1976) includes a member's spouse and child. See 37 U.S.C. 401. A child of members married to each other is considered the dependent of both members. *Matter of McDonald,* 60 Comp. Gen. 154 (1981); 54 *id.* 665, 667 (1975); *Matter of Cruise,* B-180328, October 21, 1974. However, only one of the members may claim the child as a dependent for the purpose of the increased quarters allowance since the law permits

only one payment of the allowance on account of the same dependents. 51 Comp. Gen. 413 (1972). Moreover, ordinarily married members (not divorced or separated) with more than one child are not allowed to divide the children in order that each member can claim a dependent. All common dependents are automatically included in one class. Thus, if a member is entitled to the quarters allowance at the with dependents rate, such entitlement exists whether that member has one or more dependents. *Matter of Cruise,* B-180328, October 21, 1974.

We find that that rule should also apply to divorced or separated members with common dependents when the dependents are all in the legal custody of one parent. The situation would differ only where the class of common dependents is divided by court order or separation agreement (each member receiving custody of one child and no child support being awarded) or where joint custody required two separate households. The Haag's class of common dependents has not been so separated. Both children reside in the same house. Mr. Haag's parental rights pertain to both dependents. In addition, Ms. Haag is under court order to place the support payment received while the children are with their father in a trust fund created in the names of both children. The fact that Mr. Haag's support payments are on behalf of only one of the children is not, by itself, enough to divide the class of common dependents. Therefore, we find that either Mr. Haag or Ms. Haag (but not both) is entitled to the increased allowance on account of their children while they are not residing in Government quarters.

Paragraph 30236a of the Pay and Allowances Manual authorizes the increased allowance to the member paying child support if the amount of child support is sufficient to qualify under the criteria set forth therein. The member with custody receives basic allowance for quarters at the without dependents rate. Accordingly, Ms. Haag's claim for the difference between basic allowance for quarters at the without dependents rate and that allowance at the with dependents rate may not be allowed.

[B-210420]

Health and Human Services Department—Regulations—Procurement Practices—Contractual Preference to Indian Organizations—Legality of Preference

Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more are within competitive range is improper, since there is no legal basis for such a preference.

Matter of: Educational Services Group (ESG), Management Concepts Incorporated, May 2, 1983:

Educational Services Group (ESG), Management Concepts Incorporated, protests an Indian preference provision in solicitation No. 105-83-P-6103 issued by the Department of Health and Human Services (HHS). The provision, included pursuant to HHS regulations at 45 C.F.R. § 1336.60(b) (1982), requires that HHS's Administration for Native Americans give Indian organizations and Indian-owned economic enterprises preference in the award of contracts which are for the benefit of Indians. The solicitation provision further defines the preference as requiring negotiation and award solely with Indian organizations if one or more Indian organizations or Indian-owned economic enterprises are within the competitive range. ESG contends that there is no legal basis for the preference.

We sustain the protest.

The cited regulation is part of HHS's implementation of the Native American Programs Act of 1974, 42 U.S.C. § 2991 *et seq.* (1976), which is designed to promote economic and social self-sufficiency for American Indians, and Hawaiian and Alaskan Natives. HHS contends that section 803(a), 42 U.S.C. § 2991b(a), supports the Indian preference contained in the regulation, although the agency does not address the propriety of this particular solicitation's definition of how the preference will be accorded.[1] Section 803(a) authorizes the Secretary of HHS to provide financial assistance for the purpose of promoting the goal of economic and social self-sufficiency for American Indians. HHS argues that the Indian preference provision reasonably furthers the Act's general purposes.

We do not agree that section 803(a) supports the preference at 45 C.F.R. § 1336.60(b), and we find nothing else in the Act or its legislative history that otherwise would permit the preference included in this solicitation. Section 803(a) authorizes financial assistance to "public and nonprofit private agencies" such as the governing bodies of Indian tribes on Federal and State reservations, not to Indian-owned economic organizations. Furthermore, section 813 of

[1] HHS admits that neither the Buy Indian Act, 25 U.S.C. § 47, which permits setting procurements aside for Indians, nor section 7(b) of the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450e(b), which concerns Indian preferences in subcontracting, applies to this procurement.

the Act, 42 U.S.C. § 2992c(l), defines the type of financial assistance contemplated as "assistance advanced by grant, agreement or contract," and specifically excludes "the procurement of plant or equipment, or goods or services."

The Federal Procurement Regulations (FPR), which implement the laws governing contracts by the Federal Government, require that negotiated procurements be conducted on a competitive basis to the maximum extent possible, FPR § 1-3.101(d) (1964 ed.), and that discussions be conducted with all offerors in the competitive range. FPR § 1-3.805-1. These FPR provisions, implementing a statute of multi-agency applicability, are mandatory on HHS and, in the absence of statutory authority allowing it to do so, HHS may not issue regulations which are inconsistent with the FPR. See *Environmental Growth Chambers,* B-201333, October 8, 1981, 81-2 CPD 286. Since there is no statutory basis for the Indian preference set out in 45 C.F.R. § 1336.60(b), the preference violates the FPR requirement for maximum competition, and this solicitation's implementation of the preference also violates the discussions requirement. We therefore recommend that HHS's regulations be revised to eliminate the preference, and that the solicitation be amended to provide for discussions with all offerors within the competitive range. By separate letter, we are advising the Secretary of Health and Human Services.

The protest is sustained.

[B-209192]

Bids—Invitation for Bids—Ambiguous—Service Contract Act Provisions

Our Office will consider a protest alleging terms of a solicitation to be defective although those terms concern the Service Contract Act, the enforcement of which is under the jurisdiction of the Department of Labor.

Bids—Invitation for Bids—Ambiguous

Invitation for bids (IFB) which specified class "A" security guards but contained Service Contract Act Wage Determination of class I and class II security guards was ambiguous and should have been amended. However, where the record indicates that no bidders were prejudiced by the ambiguity and the Government will receive the desired services, no "cogent and compelling reason" exists for cancellation of the IFB and resolicitation.

Matter of: American Mutual Protective Bureau, May 3, 1983:

American Mutual Protective Bureau (American) protests the procurement of guard services under invitation for bids (IFB) No. MDA902-82-B-0011 issued by the American Forces Radio and T.V. Service, Department of Defense (Defense). American contends that the solicitation contains ambiguous terms which make it necessary to cancel the solicitation and to resolicit this procurement.

We deny the protest.

Initially, American, the then incumbent contractor, sent a TWX to the contracting officer prior to bid opening questioning the type of guard service solicited and the responsibility for uniform cleaning fees. This protest was orally denied by the contracting officer in a telephone conversation on September 22, 1982, and a timely protest was subsequently received by our Office.

Bids were opened as scheduled on September 24, 1982, and in March 1983 Defense approved award of the contract to the low bidder, notwithstanding the protest.

American, the fifth low bidder, contends that an ambiguity exists in the IFB regarding the class of guards, because the IFB, under "Description/Specifications," specifies "class 'A' " guards, but wage attachment 78-56 (Rev. 6), March 11, 1982, describes the guards for purposes of the minimum wage payable under the Service Contract Act, 41 U.S.C. § 351 *et. seq.* (1976), as class II and class I. American asserts that because of this ambiguity prospective bidders were unable to determine whether to bid the service with the wage rate for class I ($4.31 per hour) or class II ($7.48 per hour) guards, and since the cost for each is different, bids could not be evaluated on an equal basis. The IFB, therefore, should have been amended for clarification.

American also contends that it is essential that bidders be advised of the minimum wage requirements in relation to uniform cleaning costs so that in computing price-per-hour of guard services the bidders will be considering all pertinent costs. The IFB omits reference to a uniform cleaning fee.

Defense contends that neither the protester nor any other bidder was misled by the discrepancy between the specification and the wage determination, since the wage determination is merely a statement of the minimum wage which a contractor must pay to specify classes of guards under the Service Contract Act, 41 U.S.C. § 351 *et seq.,* and, citing 48 Comp. Gen. 22 (1968) and *United States* v. *Winghampton Construction Company,* 347 U.S. 171 (1954), argues that it constitutes neither a representation that guard services are available at those wage rates nor dictated rates which the bidder must pay, other than the specified minimum.

Concerning the uniform cleaning allowance, Defense contends that the IFB adequately informs bidders of a contractor's obligation. The IFB incorporated by reference the Service Contract Act (Defense Acquisition Regulation (DAR) § 7-1903.41 (Defense Acquisition Circular (DAC)) No. 76-7, April 29, 1977), which incorporates 29 Code of Federal Regulations (C.F.R.) part 4 describing the method of payment of rates and fringe benefits. 29 C.F.R. § 4.165 (1982) states "No deduction, rebate or refund is permitted except as hereinafter stated." In addition, the IFB noted that uniforms will be at the contractor's expense.

Finally, citing our decision in *Ellsworth Street Associates,* B-206859, June 21, 1982, 82-1 CPD 611, Defense argues that the pro-

test against the failure to include information in the IFB concerning a uniform cleaning allowance should be dismissed because the administration and enforcement of the Service Contract Act is under the jurisdiction of the Department of Labor.

Our decision in *Ellsworth Street Associates, supra,* is not applicable. In that decision, the protest was that acceptance of an allegedly below cost bid would result in a violation of the Service Contract Act. We dismissed the protest because enforcement of the Service Contract Act is vested in the Department of Labor and whether contract provisions are carried out is a matter of contract administration which is the function of the contracting agency. We will, however, consider a protest, which, as here, alleges that the solicitation is deficient because it does not contain provisions clearly setting out the requirements of the Service Contract Act.

At the time that the IFB was prepared, security guards were classified as class "A," those required to be proficient with firearms and physically fit, and class "B." By Revision 6 of March 11, 1982, the class "A" and the class "B" designations were changed to class II and class I, respectively. On receipt of the revision it was incorporated into the IFB but the designation change was not noted and, therefore, was not changed in the specifications.

The contracting officer reports that several telephone inquiries were received to confirm that the new class II was the same as the previous class "A." The IFB was not amended because of lack of time since bid opening was on September 24 and the protester's current contract expired on September 30.

At bid opening, attended by six of the fifteen bidders, including the protester, the contracting officer announced that questions had arisen concerning guard classification and uniform cleaning allowance. The contracting officer clarified the matters for those present and there were, reportedly, no questions. Cost breakdown data submitted by the six low bidders, including the protester, indicates that all used the class II guard rate.

The IFB specifies "armed class 'A'" guards (now class II guards). Class "B" guards (now class I guards) may also bear arms, but, unlike the class II guards, are not required to demonstrate either physical fitness or proficiency with firearms or other weapons. There is nothing in the description of duties or under qualification of guards in the IFB which clearly indicates that the class "A" guards are the class II guards in the wage rate determination as evidenced by the several telephone inquires to clarify the discrepancy.

The IFB contains conflicting provisions which create an ambiguity, and the IFB should have been amended to clarify the conflict. However, there is no evidence in the record that the protester or any other bidder was misled by the discrepancy. On the contrary, the evidence shows that the six low bidders correctly computed costs on the basis of the correct class II salary rates, which are the

higher of the two salary rates. As noted by Defense, it is unlikely that higher priced bidders were misled into using the lower salary rates.

Concerning a uniform cleaning allowance, the contracting officer notes that in the past dry cleaning was an accepted fringe benefit, but with the advent of "Wash and Wear" guard uniforms as acceptable wear, the cleaning benefits were not required "except where certain guards are required to wear uniforms requiring dry cleaning."

The Service Contract Act and the implementing regulations (29 C.F.R. § 4.1 *et seq.* (1982)), make clear that the contractor is obligated to pay not less than the minimum wage specified in the wage determination unreduced by fringe benefits Therefore, since the wage determination did not list a uniform allowance and the IFB made clear uniforms were the contractor's responsibility, we find the IFB was not ambiguous as to the payment of such allowance.

DAR § 2-404.1 (DAC No. 76-17, September 1, 1978), provides that a solicitation may be canceled after bid opening only when a cogent and compelling reason exists since cancellation after opening of bids tends to discourage competition because it publicly discloses bids without award and causes bidders to have expended manpower and money in bid preparation without the possibility of acceptance. *Marmac Industries, Inc.,* B-203377.5, January 8, 1982, 82-1 CPD 22; *Tennessee Valley Service,* B-188771, September 29, 1977, 77-2 CPD 241. The regulations then provide a list of grounds which may justify cancellation of an IFB after bid opening and before award, including inadequate or ambiguous specifications.

However, the fact that specifications are inadequate, ambiguous or otherwise deficient is not a compelling or cogent reason to cancel an IFB and resolicit the requirement if the Government will receive the goods or services wanted and there is no showing of prejudice to bidders. *GAF Corporation; Minnesota Mining and Manufacturing Company,* 53 Comp. Gen. 586 (1974), 74-1 CPD 68.

There is no indication in the record either that the Government will not receive the services desired or that any bidder was misled by the defect in the terms. Compare *Transco Security, Inc. of Ohio* (B-197177, May 29, 1980, 80-1 CPD 371), where we held an IFB should be canceled where the four low bidders were misled by the IFB into basing their bids on an improper, lower paid guard classification and were thereby prejudiced.

The protest is denied.

[B-200923]

Courts—Judges—Compensation—Increases—Comparability Pay Adjustment—Specific Congressional Authorization Requirement

Question presented is entitlement of Federal judges to 4 percent comparability increase under sec. 129 of Pub. L. 97-377, Dec. 21, 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of sec. 129(b) of Pub. L. 97-377, combined with specific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges.

Matter of: Federal Judges II—Entitlement to December 1982 Comparability Pay Increase, May 6, 1983:

The issue in this decision is whether section 129 of Public Law 97-377, December 21, 1982, 96 Stat. 1830, 1914, provides "specific congressional authorization" for a pay increase for Federal judges as required by section 140 of Public Law 97-92, December 15, 1981, 95 Stat. 1183. We hold that the language of section 129(b) along with the legislative history of the provision constitutes the requisite specific congressional authorization for a 4 percent comparability pay increase for Federal judges.

BACKGROUND

This decision is in response to a request from the Honorable John P. East, United States Senate, concerning a recent pay increase for Federal judges. Senator East notes that in January 1983, Federal judges received a 4 percent pay increase based on the language and legislative history of section 129 of Public Law 97-377. Senator East argues that the language of section 129 does not specifically authorize a pay increase for Federal judges and that, since section 129 is not ambiguous, no reference to the legislative history is permitted. He contends further that the language of section 129 presupposes a pay increase of 27.2 percent which is then limited to 15 percent, but since Federal judges do not receive automatic pay increases, this language does not authorize a pay increase for Federal judges. Finally, Senator East argues that, even if the language of the Conference Report on Public Law 97-377 interpreting section 129 as providing a pay increase for Federal judges is taken into account, it is not sufficient justification for such a pay increase in view of the entire legislative history of the continuing resolution and the definite and precise requirements of section 140 of Public Law 97-92 that Federal judges may not receive pay increases absent specific congressional authorization.

In response to our request for comments, Mr. William M. Nichols, the General Counsel of the Administrative Office of the United States Courts, argues that section 129 of Public Law 97-377 does provide for a 4 percent salary increase for Federal judges. Mr.

Nichols contends that the reference in section 129 to "senior * * * judicial * * * positions" must refer to Federal judges or it would have no meaning or apparent purpose since the salaries of other senior officials of the judiciary are fixed by statute with reference either to judicial salaries or to levels of the Executive Schedule or General Schedule. He argues further that it is reasonable to look to the Conference Report on Public Law 97-377 to understand the compromise reached on the issue of lifting the pay cap for senior executive, legislative, and judicial positions. Finally, he argues that section 129 authorizes pay increases up to 15 percent, and since the only comparability pay increase Federal judges had not received was 4 percent in October 1982, the effect of section 129 was to grant Federal judges a 4 percent increase. He notes that other Federal officials received up to 15 percent because they had been denied several recent comparability increases.

OPINION

As noted in the letter from Mr. Nichols, the salaries of Federal judges are subject to adjustments by two mechanisms: (1) the Federal Salary Act of 1967, Public Law 90-206, Title II, 81 Stat. 624, providing for a quadrennial review of executive, legislative, and judicial salaries (2 U.S.C. §§ 351-361); and (2) the Executive Salary Cost-of-Living Adjustment Act, Public Law 94-82, Title II, 89 Stat. 419, 422 (1975), providing that salaries covered by the Federal Salary Act of 1967 will receive the same comparability adjustment on October 1 of each year as is made to the General Schedule under 5 U.S.C. § 5305 (5 U.S.C. § 5318 and 28 U.S.C. § 461).

Prior to 1982, under *United States* v. *Will,* 449 U.S. 200, 224-225 (1980), Federal judges received these annual comparability adjustments despite the enactment of "caps" on executive, legislative, and judicial salaries. The Supreme Court held that, since the pay caps were enacted after October 1, these caps diminished the compensation of Federal judges which had increased automatically on October 1 by the amount of comparability adjustment granted to the General Schedule. Such diminution of compensation was held to violate Article III of the Constitution. Therefore, Federal judges, in contrast to other high-level officials, received salary increases in 1976, 1979, 1980, and 1981. See *Federal Judges I,* B-200923, November 23, 1982, 62 Comp. Gen. 54.

Subsequent to the October 1981 pay increase, the Congress enacted Public Law 97-92, December 15, 1981, 95 Stat. 1183, a continuing appropriations act which provides in section 140 that Federal judges are not entitled to any salary increase "except as may be specifically authorized by Act of Congress." We held in our decision in *Federal Judges I,* cited above, that section 140 was permanent legislation and that, in the absence of a specific authorization

by Congress, Federal judges were not entitled to any pay increase in October 1982. See also B-200923, October 1, 1982.

The question now presented to us is whether the language of section 129 of Public Law 97-377 constitutes a specific congressional authorization as required by section 140 of Public Law 97-92.

Section 129 of Public Law 97-377 provides in subsection (b) as follows:

> (b) In lieu of payment of salary increases up to 27.2 percent as authorized by law for *senior executive, judicial, and legislative positions* (including Members of Congress), it is the purpose of this section to limit such increases to 15 percent. Notwithstanding the provisions of section 306 of S. 2939 made applicable by subsection (a) of this section, nothing in subsection (a) shall (or be construed to) require that the rate of salary or pay payable to any individual for or on account of services performed after December 17, 1982, be limited to an amount less than the rate (or maximum rate, if higher) of salary or pay payable as of such date for the position involved increased by 15 percent and rounded in accordance with section 5318 of title 5, United States Code. [Italic supplied.]

The crucial language in section 129(b) is that which refers to salary increases for "senior executive, judicial, and legislative positions." Although Senator East argues that this language is unambiguous and does not require reference to the legislative history, the Supreme Court has recognized that there is no rule of law forbidding the use of an aid to construction of the meaning of words, as used in a statute, however clear the words may appear upon examination. *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 9-10 (1976), quoting *United States* v. *American Trucking Assns.,* 310 U.S. 534, 543-544 (1940). In *Train,* the Court found that the legislative history shed considerable light on the question involved. Similarly, we believe that the legislative history here sheds considerable light on the meaning of the term "senior * * * judicial * * * positions" as used in the continuing resolution.

The pertinent legislative history of section 129 is contained in the Conference Report on H.J. Res. 631, H.R. Rept. No. 97-80, 97th Cong., 2d. Sess., December 20, 1982, which states on page 193 as follows:

> The conferees have dropped the House provision regarding federal judges. Therefore, section 140 of P.L. 97-92 would not prevent the October 1982 cost-of-living adjustment from being paid to federal judges or Justices of the Supreme Court since the conference agreement provides a specific authorization by Act of Congress for salary increases for senior-level personnel, which includes those judges and Justices.

The legislative intent of the conferees in section 129 is clearly stated with a specific reference to section 140 of Public Law 97-92 which would otherwise preclude any pay increase for Federal judges. The conferees expressly rejected a House-approved provision which would have denied any increase to Federal judges. The House provision, introduced by Representative Fazio, provided no adjustment for Federal judges and was agreed to by the House of Representatives. See 128 Cong. Rec. H9717-9722 (daily ed., December 14, 1982). We believe the rejection of the House approved provi-

sion is clear evidence of congressional intent to provide Federal judges with a salary increase under this continuing resolution.

Although the Congress could have chosen more precise words to accomplish this result, we conclude that section 129 of Public Law 97-377 specifically authorizes a pay increase for Federal judges and meets the conditions of section 140 of Public Law 97-92.

Accordingly, we hold that the pay of Federal judges was properly increased under the authority of section 129 of Public Law 97-377.

[B-201072]

Appropriations—Deficiencies—Anti-Deficiency Act—Violations—Federal Procurement Regulations Sections 1-7.204-5 and 1-7.404-9—Indemnification Provisions

Public Contract Law Section (PCLS), American Bar Association, urges reconsideration of B-201072, May 3, 1982, in which we held that a clause for use in cost reimbursement contracts entitled "Insurance-Liability to Third Persons," appearing in Federal Procurement Regulations 1-7.204-5, violates the Antideficiency Act, 31 U.S.C. 1341. PCLS sees no violation on face of clause because agencies are bound to contract in accordance with law and regulations and have adequate accounting controls to prevent such violations. General Accounting Office (GAO) points out that it is impossible to avoid violation if clause is used as written because maximum amount of obligation cannot be determined at time the contract is signed. May 3 decision is distinguished and affirmed.

Appropriations—Deficiencies—Anti-Deficiency Act—Violations—Federal Procurement Regulations Sections 1-7.204-5 and 1-7.404-9—Indemnification Provisions

In B-201072, May 3, 1982, GAO recommended modified indemnity clause to avoid violation of Antideficiency Act, 31 U.S.C. 1341. Modification would limit Government liability to amounts available for obligation at time loss occurs and that nothing should be construed to bind the Congress to appropriate additional funds to make up any deficiency. PCLS says this gives contractor an illusory promise because appropriation could be exhausted at time loss occurs. GAO agrees. Modification could be equally disastrous for agencies if entire balance of appropriation is needed to pay an indemnity. GAO suggests no open-ended indemnities be promised without statutory authority to contract in advance of appropriations.

Appropriations—Deficiencies—Anti-Deficiency Act—Violations—Federal Procurement Regulations Sections 1-7.204-5 and 1-7.404-9—Indemnification Provisions

PCLS believes holding in B-201072, May 3, 1982, conflicts with another line of decisions holding that "Insurance-Liability to Third Persons" clause was valid. Decisions cited by PCLS all involved indemnities where maximum liability was determinable and funds could be obligated or administratively reserved to cover it.

Matter of: Assumption by Government of Contractor Liability to Third Persons—Reconsideration, May 12, 1983:

On May 3, 1982, the Comptroller General issued a decision (B-201072) in response to a request from the Department of Health and Human Services (HHS) on the validity of a clause in the Federal Procurement Regulations (FPR) entitled "Insurance-Liability

to Third Persons." [1] The clause is intended for use in cost-reimbursement supply and research and development contracts. It provides virtually complete indemnity to contractors for any liability incurred in the performance of such contracts, in unlimited amounts and without restrictions. We agreed with HHS' assessment that use of the clause in its present form would constitute a violation of the Antideficiency Act, and suggested modified language that would avoid that result. We have now received a letter from the Public Contract Law Section (PCLS) of the American Bar Association, urging reconsideration of that decision. We have carefully considered the arguments presented by the PCLS but are not persuaded that our May 3, 1982 decision was incorrect.

As a general rule, this Office does not render decisions in response to requests from non-governmental entities or from persons not parties to the dispute in question. In this instance, however, we recognize that the PCLS reflects the views of many persons who do business with the Government and who would be directly affected by our decision if all Federal agencies implement it.[2]

The PCLS urges reconsideration of the May 3 decision "because of the de-stabilizing effect it will have on the time tested allocation of risks between the contractor and the Government." Its principal arguments are summarized as follows:

1. A. The May 3 decision upset a 40-year practice. In 1943, the Comptroller General specifically approved use of this type of clause.

B. The May 3 decision conflicts with a long line of opinions relating to the same clause.

C. The clause has been used by procurement agencies who were fully aware that it conflicted with other "unrelated" cases.

2. There is no Antideficiency Act violation on the face of the "Insurance-Liability to Third Persons" clause.

3. The modification recommended by GAO is a "naked promise because an appropriation may be exhausted at the time a loss occurs."

These arguments are discussed in the order presented below.

1. A. The present "Insurance-Liability to Third Persons" clause was specifically approved by the Comptroller General in 1943.

The PCLS refers specifically to 22 Comp. Gen. 892 (1943), which it characterizes as holding that the indemnity against liability may be considered a "necessary incident" to the placement of a cost reimbursement contract. It adds:

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[1] The clause reads:
(c) The contractor shall be reimbursed * * * without regard to and as an exception to the "Limitation of Cost" or the "Limitation of Funds" clause of this contract, for liabilities to third persons for loss of or damage to property * * * or for death or bodily injury, not compensated by insurance or otherwise, arising out of the performance of this contract, whether or not caused by the negligence of the Contractor, his agents, servants, or employees * * *. FPR Section 1-7.204-5.

[2] Our May 3 decision was primarily concerned with the clause found at FPR §§ 1-7.204-5 and 1-7.404-9. However, we noted that the use of the same clause in the same types of contracts is provided for under Defense Acquisition Regulation §§ 7-203.22 and 7-402.26. Therefore, a wide segment of the Government procurement community is affected.

> The underlying legal doctrine was that the appropriation properly obligated under that contract could by implication be deemed to cover, *subject to the amount available therein,* the cost of any indemnity and the expenses of completion of the contract work. [Italic supplied.]

In the view of the PCLS, this is directly contrary to our May 3 decision.

We see no such conflict. The 1943 decision responded to a question from the Chairman of the United States Maritime Commission. At that time, the Commission was using contractors to perform trials and tests on the seaworthiness of its vessels. The contractors were required to take out "public liability" insurance against damages or losses inflicted on third parties. The Commission was reimbursing the contractors for the insurance premiums. The precise question asked was whether the Commission could, in effect "self-insure;" that is, whether it could amend its existing contracts to stop paying insurance premiums and instead agree to indemnify the contractor for any liability to third parties, whether caused by negligence of a contractor's employee or otherwise.

The Comptroller General replied (in paraphrase):

> That's reasonable enough, if you stop paying the insurance premiums, but if you amend your existing contracts to so provide, you cannot agree to pay more in indemnity than the amount presently covered by the existing insurance contracts.

In addition, as the PCLS acknowledges in the portion of its submission previously quoted, any new obligations for indemnification were authorized only "to the extent appropriations are available therefor."

A careful reading of the 1943 decision and the kind of indemnity it sanctioned thus shows two important differences from the "Insurance-Liability to Third Persons" clause at issue. First, the amount of the Government's liability was limited to a precise amount—the amount of liability covered by the contractors' existing public liability insurance—and second, the amount of the indemnity could not exceed available appropriations. In contrast, the present clause is totally "open-ended;" that is, no maximum liability is either stated or ascertainable by reference to some other document. In addition, no attempt is made to limit Government liability to the amounts available in its appropriation at the time the contract was made or at any other time. In fact, the indemnity obligation is specifically made an exception to the Limitation of Cost or Limitation of Funds clause of the contract which would otherwise be applicable.

B. The PCLS claims that our May 3 decision conflicts with earlier Comptroller General opinions relating to the same clause. Specifically, it cites (in addition to 22 Comp. Gen. 892, discussed above) 20 *id.* 632 (1941); 21 *id.* 149 (1941); and 59 *id.* 705 (1980).

In both 1941 decisions, the only question involved reimbursement to a contractor for damage to his own property which had been leased by the Government. In the first case, the damage to some

heavy equipment was caused by the Government's own negligence; in the second, the damage was attributable to the negligence of the contractor's employees. In neither case was damage to third parties involved. The maximum amount of any potential property damage was therefore readily ascertainable; *i.e.,* even if the equipment was totally destroyed, the maximum liability would be the value of the equipment.

The 1980 decision, 59 Comp. Gen. 705, appears, on first reading, to support the PCLS contention. The Comptroller General did permit the General Services Administration (GSA) to agree to an open-ended and unrestricted indemnity to a public utility providing electric power to a Government agency under the Federal Property and Administrative Services Act. On closer reading, however, it becomes apparent that the Comptroller General carved out a very limited exception to a general rule prohibiting such indemnities.

GSA had been receiving power for many years under general tariff provisions that incorporated the same indemnification provision for all customers of the utility. When GSA was offered a more advantageous individual contract, it sought to drop the indemnity provision, in keeping with previous GAO decisions, including a decision issued only a few months earlier to the Department of State (59 Comp. Gen. 369 (1980)). The public utility insisted on the indemnity and there was no other source from which the Government could obtain the needed utility services. The Comptroller General agreed to permit the indemnity clause, but carefully pointed out that the case was not to serve as a precedent.

This was made very clear a few months later when the Architect of the Capitol sought to use a similar clause in an agreement with the Potomac Electric Power Company to install and test certain equipment designed to monitor the use of electricity for conservation purposes. The Comptroller General refused to follow 59 Comp. Gen. 705 because the Architect's situation did not fall within the "narrow exception created by the GSA decision." B-197583, January 19, 1981. PEPCO, it was pointed out, did not have a monopoly on the services desired.

C. The PCLS acknowledges that there is a long line of Comptroller General decisions that state:

> Absent specific authority, indemnity provisions in agreements which subject the United States to contingent and undetermined liabilities may contravene the Antideficiency Act.

However, the PCLS terms this line of decisions "unrelated," and in any case, it asserts that until our May 3, 1982 decision was issued, there was "no basis to believe that these two distinct lines of Comptroller General decisions would intersect and clash with each other."

As was previously pointed out, there is no clash that we can discern. Except for the 1980 utility case, discussed above, the accounting officers of the Government have never issued a decision sanc-

tioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary.

This line of cases stretches back to the days before this Office came into existence. In 15 Comp. Dec. 405 (1909), the Comptroller General's predecessor, the Secretary of the Treasury, wrote a stern reply to the Secretary of Commerce and Labor, who had asked whether his agency could indemnify a railroad against any liability for accidents or injuries arising from the use of "velocipede" cars by Government employees along the railroad tracks. The Secretary of the Treasury said:

> Under the [Antideficiency Act], no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum, that may exceed the appropriation and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency, the consequences of which cannot be defined by the contract.

The line of decisions applying this general principle stretches, unbroken, right up to the May 3 decision at issue. *See,* for example, 7 Comp. Gen. 507 (1928); 16 *id.* 803 (1937); 20 *id.* 95 (1940) ; A-95749, October 14, 1938; 35 Comp. Gen. 85 (1955); 59 *id.* 369 (1980); B-197583, January 19, 1981. See also, *California-Pacific Utilities Co.* v. *United States,* 194 Ct. Cl. 703, 715 (1971).

It should be noted that not all indemnity contracts are proscribed. As pointed out earlier (in discussing the cases that the PCLS thought were in conflict with our May 3 decision), we have never objected to an indemnity where the maximum amount of liability is fixed or readily ascertainable, and where the agency had sufficient funds in its appropriation which could be obligated or administratively reserved to cover the maximum liability. *See* 42 Comp. Gen. 708 (1963) (overruled in part by 54 *id.* 824 (1975) with respect to the need to reserve funds); B-114860, December 19, 1979; 48 Comp. Gen. 361 (1968). *See also* 54 *id.* 824 (1975), which set forth the rules under which the Government may, in limited circumstances, assume the risk of damage to contractor-owned property used in the performance of its contract with the Government.

Another category of permissible indemnity contracts is those which are protected by the statutory umbrella. The most common example is defense-related contracts which come under 50 U.S.C. 1431 (often referred to by its Public Law designation, Pub. L. 85-804). There are other statutes that exempt contracts for extra-hazardous activities related to nuclear energy or to the administration of swine flu vaccine. These statutes constitute statutory exceptions to the Antideficiency Act. They confer what might be termed "contract authority"—*i.e.* authority to commit the Government to future obligations even though no appropriations are available to pay the obligations at the time the contract is made. Such authority was given in each case after full consideration by the Congress of the country's national security or other needs which could not be obtained without permitting this type of indemnity. We have no

problem with this principle. It is our view, however, that statutory exceptions should be made by the Congress and not by the executive branch. (See later discussion in response to question 3.)

2. There is no Antideficiency Act violation on the face of the "Insurance-Liability to Third Persons" clause.

The PCLS appears to be quite familiar with the provisions of the Antideficiency Act, subsection (a) of which is now codified at 31 U.S.C. 1341. It is, therefore, unnecessary to repeat its text here, except to emphasize that the Act prohibits the incurring of any obligation for the future payment of money in advance of or in excess of appropriations adequate to cover it. If the maximum liability is determinable, it is possible to set aside sufficient funds to meet the obligation if and when it occurs. The clause in question, however, promises an indemnity for property damages, death, or bodily injury. Who can set a maximum price, at the time the indemnity obligation is incurred, on a human life or predict the amount of a court award for serious injury or other dire consequences arising from the performance of a contract? We find that the clause, *on its face,* commits the Government to pay at some future time an indefinite sum of money should certain events happen. There is no possible way to know at the time the contract is signed whether there are sufficient funds in the appropriation to cover the liability if or when it arises because no one knows in advance how much the liability may be.

The PCLS appears to base its contrary argument on the fact that agency regulations adjure all contracting officers to adhere to "all applicable requirements of law, Exective orders and regulations * * *." According to PCLS, this means:

> Contracting officers have entered into cost-reimbursement type contracts in accordance with applicable provisions of law, as interpreted by, among others, the Comptroller General. Moreover, it would appear Anti-Deficiency Act violations may be barred through the accounting controls established by the procuring agencies for this purpose.

Unfortunately, regulations like accounting controls are not always followed. Moreover, as explained above, no matter how well intentioned, an agency's contracting and fiscal officers who use the clause as written could not possibly adhere to the requirements of the law or their own accounting controls because they cannot determine the extent of the obligation they are incurring at the time the contract is signed. We therefore affirm our holding in B-201072, May 3, 1982, that the "Insurance-Liability to Third Persons" clause is invalid because, as written, it violates the Antideficiency Act.

3. The modification recommended by GAO is a "naked promise because an appropriation may be exhausted at the time a loss occurs."

GAO recommended in its May 3 decision, among others, that the clause be amended to provide that the indemnity be limited to

amounts available in agency appropriations *at the time the liability arises,* and that nothing in the contract shall be considered to bind the Congress to appropriate additional funds to cover any deficiency. It is the presence of the underlined phrase that disturbs the PCLS.

We agree with the PCLS' observation. A little over a year ago, we issued a decision which illustrates the dilemma well. In B-202518, January 8, 1982, we were asked to approve a payment to the State of New York for injuries to a State militiaman incurred while providing guard services to the Department of the Army for the Winter Olympic Games. Army had included an indemnity clause in the form we recommended (rather than using the "Insurance-Liability to Third Persons" clause permitted by the DAR) in its cost reimbursement support contract with the State of New York. Had the accident happened closer to the end of the fiscal year, it is quite possible that no unobligated balance would have been available to reimburse the State for its Workman's Compensation payments.

If, on the other hand, the accident took place in the beginning of the fiscal year and (let us assume) a large number of militiamen were injured simultaneously, the payment of the indemnity obligations might well wipe out the entire unobligated balance of the appropriation for the rest of the fiscal year. This would certainly frustrate the intent of the Congress, which was to support a winter Olympics program. Whether it would be feasible to rescue the program with supplemental appropriations is problematical, in view of tight budgetary restrictions. At best, the pressures brought to bear on the Congress are precisely the "coercive deficiency" pressures which, as the PCLS describes so aptly, the Antideficiency Act was enacted to eliminate.

To sum up, the solution to the problem recommended in the May 3, 1982 decision, among others, prevents an overt violation of the Antideficiency Act but has potentially disastrous fiscal consequences for the Federal agency involved, and may offer only illusory benefits to the contractor. The PCLS solution, which appears to urge us to endorse the "Insurance-Liability to Third Persons" clause, is not acceptable because it amounts to a *prima facie* violation of the Antideficiency Act.

We have been informally considering a third approach, which we have shared with the Office of Acquistion Policy, GSA, the Director of the Defense Acquisition Regulatory Council, DOD, and the Director, Office of Federal Procurement Policy, Office of Management and Budget. It is our tentative position that even if contract indemnification clauses are rewritten to meet the minimum requirements of the Antideficiency Act, there should be a clear Government-wide policy restricting their use. Since the potential liability of the Government created by open-ended, indefinite indemnification clauses is so great, we think that any such authority should be

viewed as an exception from the basic legislative policy that no Government agency should enter into financial commitments, even though contingent in nature, without an appropriation to cover them. Exceptions to this policy should not be made without express Congressional acquiescence, as has been done in the past whenever the Congress has decided that it was in the best interests of the Government to assume the risks of having to pay off on an indemnity obligation. *See,* for example, 10 U.S.C. § 2354 (1976); 38 U.S.C. § 4101 (1976); and 42 U.S.C. § 2210 (1976). *See also* Pub. L. 85-804 and its implementing Executive Order No. 10789, discussed earlier. In other words, our tentative position is that open-ended, indemnification clauses should only be permitted when an agency has been given statutory authority to enter into such an arrangement.

[B-206356]

Contracts—Payments—Assignment—Assignee's Right to Payment—First v. Second Assignee

First assignee's (computer leasing company/financing institution) claim for sums paid to second assignee (also computer leasing company/financing institution) under modification of the same contract is denied because (1) the first assignee has only a qualified interest in the assigned payment, commensurate with the amount of equipment which it financed, and (2) it appears that the first assignee has received all payments it is entitled to for the equipment which it financed. Therefore, first assignee has no basis for its claim.

Matter of: Spectrum, May 17, 1983:

Spectrum, a self-described "financing institution," claims payment of $54,632.80 by virtue of an assignment of proceeds which it received from Harris Corporation (Harris) under Army lease contract No. DAAG-36-77-C-0022 issued by the New Cumberland Army Depot for computer equipment. The claimed $54,632.80 was paid by the Army to SMS Leasing, Inc. (SMS), a subsequent assignee of proceeds under the same contract. Spectrum's assignment was absolute on its face and Spectrum never released the assignment. For these and other reasons, Spectrum contends that the Army's payments to SMS were improper and that Spectrum should now receive the payments made to SMS.

We deny the claim.

In *Alanthus Peripherals, Incorporated,* 54 Comp. Gen. 80 (1974), 74-2 CPD 71, the company which requested our opinion described the method of financing customarily employed in the computer industry. The company explained that in the computer industry, original equipment manufacturers (OEM's), such as Harris, lease their goods to customers instead of selling them. According to Alanthus, there were two principal reasons for this practice: (1) it was the method of marketing traditionally used by International Business Machines Corporation, and (2) in the face of rapid rates of technological innovation (and concurrent obsolescence), customers demanded short-term arrangements for fear of being saddled with

out-of-date equipment. However, leasing slows the OEM's recovery of manufacturing costs and threatens "positive cash flow." To overcome these problems, OEM's sell both the rental property and the accounts receivable (lease payments) to companies like Spectrum and SMS. Given the unique circumstances of this industry, we held in *Alanthus, supra,* that "lease-financing" companies qualify as "financing institutions" for purposes of the Assignment of Claims Act.

In this case, Harris leased two separate lots of equipment to the Government under the same contract; the first lot was financed by Spectrum, while the second lot (under modification P0009) was financed by SMS. According to the Army, Spectrum "bid against SMS for the rights to finance the equipment purchased under Mod. P0009," but was not successful.

Spectrum argues that it had the only legally valid assignment since it was prior in time to SMS's assignment and since Spectrum's assignment conveyed: "all rights, title and interest to all lease rental payments * * * accruing under [the lease]." Further, the lease provides that "[a]ny * * * assignment * * * shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party." Moreover, Spectrum contends that payments to SMS contravene Defense Acquisition Regulation (DAR) § 7-103.8 (1976 ed.), which requires the contractor, following the assignee's release of an assignment, to notify certain parties of the release by furnishing them with a true copy of the instrument of release as a condition precedent to the contractor's receipt of the balance due under the contract. As has been noted, Spectrum did not release its assignment. Finally, Spectrum argues that when it purchased the Harris equipment and accepted the assignment, it "assumed a qualified risk of contract termination or expiration prior to the end of systems life," but it "did not assume the risk of being replaced by another assignee shopped by [Harris] * * * while * * * [the lease] was still in force."

The Army takes the position that the equipment leased from Harris under modification P0009 was a separate transaction neither included nor contemplated under the initial assignment to Spectrum. For this reason, Harris was not under an obligation to obtain a release from Spectrum prior to assigning the proceeds of modification P0009 to SMS. Moreover, the Army has noted and Spectrum has not denied that "[t]here is no allegation that Spectrum did not receive the payments due them under the basic contract but only that they did not receive the monthly payments 'made to another party' [i.e., SMS]." In this regard, the Army cites *Beaconwear Clothing Company* v. *United States,* 355 F.2d 583 (Ct. Cl. 1966), where the court stated:

> * * * Generally, an assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liabilities secured, even through the assignment appears to be absolute on its face. * * *

We have held that an assignment of "all amounts payable" under a Government contract includes amounts payable as a result of modifications or change orders until such time as the Government receives a duly executed release of the initial assignment. 23 Comp. Gen. 943 (1944). This rule presupposes that there is an outstanding financial interest secured by the amounts payable under the modifications. In our view, Spectrum has no basis from which to advance its claim since it appears that Spectrum has received all payments commensurate with the amount of equipment which Spectrum financed under the contract. Since Spectrum has no basis for its claim, we need not consider the company's arguments about the lease provision and DAR § 7-103.8, above, which, in any event, were written for the protection of the Government, not the assignee.

Accordingly, the claim is denied.

[B-209767]

Compensation—Removals, Suspensions, etc.—Backpay—Entitlement—Alternative Employment Offered—Effect of Refusal to Accept Offer

Agency denied backpay for a portion of employee's involuntary separation since he had refused an offer of temporary employment during his appeal to the Merit Systems Protection Board, and also because he did not show he was ready, willing, and able to work during that period. Employee, however, was not obligated to accept alternate employment while administrative appeals were pending. Further, no evidence shows that employee's medical condition during that period differed from his medical condition during the period for which he was awarded backpay. Accordingly, employee's claim for additional backpay is granted, with appropriate adjustments in annual and sick leave.

Compensation—Removals, Suspensions, etc.—Backpay—Overtime, etc. Inclusion—Computation Method—Agency Determination

Employee claims that he is entitled to additional overtime pay as part of his backpay award based on overtime hours worked by other employees during period of his separation. Agency based overtime payment on amount of overtime worked by the employee during preceding year. Based on the facts presented, this Office cannot say that the formula used by the agency in computing his entitlement to overtime is incorrect. Employee's claim for additional overtime in this respect is denied.

Matter of: Kenneth L. Clark—Backpay—Computation on Reinstatement to Duty, May 17, 1983:

This decision is in response to a request by counsel on behalf of Mr. Kenneth L. Clark, a former employee of the Puget Sound Naval Shipyard, Bremerton, Washington, for review of our Claims Group's Settlement Certificate Z-2836175, dated June 7, 1982. By that settlement, our Claims Group held that there was no error in the computation of Mr. Clark's backpay, annual leave, or sick leave for the period of his involuntary separation. Our Claims Group also advised Mr. Clark that his claim for travel expenses incurred in

connection with his appearances at the Merit Systems Protection Board's (MSPB) hearing should be filed with the Shipyard.

Upon review of the entire record, we modify our Claims Group's settlement in part to increase the period of time for which backpay is due, and we affirm the remainder.

The record shows that on January 20, 1980, Mr. Clark was removed from his position as a shipfitter at the Puget Sound Naval Shipyard due to excessive absenteeism. Mr. Clark appealed this action, and on June 11, 1980, the Seattle Field Office of the MSPB issued an initial decision which ordered Mr. Clark's separation canceled. The Department of the Navy petitioned the MSPB for review, but, by a decision dated December 19, 1980, the MSPB denied that petition. Mr. Clark returned to work on January 12, 1981, and worked until June 12, 1981. Mr. Clark thereafter applied for a disability retirement on August 14, 1981, which was approved by the Office of Personnel Management, effective December 2, 1981.

Mr. Clark claimed backpay for the full period of separation from January 20, 1980, to January 11, 1981. The Navy, however, did not award Mr. Clark backpay for that entire period. It was the Navy's contention, subsequently affirmed by our Claims Group, that Mr. Clark was not entitled to backpay for the period October 19, 1980, to January 11, 1981. This decision appears to be based partly on the fact that Mr. Clark refused a temporary appointment on October 17, 1980, and partly on a determination that Mr. Clark failed to provide sufficient evidence that he was medically capable of performing the duties of a shipfitter during that period.

On May 29, 1981, Mr. Clark filed a petition for enforcement with the Seattle Field Office of the MSPB. The Seattle Office, in a decision dated August 27, 1981, informed Mr. Clark that his claims concerning the amount of backpay or other amounts allegedly due are to be resolved by the General Accounting Office rather than the MSPB.

Mr. Clark contends that throughout the period of his involuntary separation he was ready, willing, and able to perform his duties. The problem is that on May 16, 1980, Mr. Clark had submitted a workers compensation claim with the Department of Labor, Office of Workers Compensation Programs (OWCP), stating that he was permanently disabled for the position of a shipfitter. Based upon this information, in offering him a temporary position pending its appeal of the Field Office decision, the Navy advised Mr. Clark that he would have to undergo a fitness-for-duty examination. Although he indicated his willingness to accept temporary employment, Mr. Clark refused this offer since he feared that the Navy would use the examination results to his detriment in the appeal pending before the MSPB, and his application for compensation before the OWCP. As a result, the Navy determined that Mr. Clark was no longer ready, willing, and able to work as required by 5

C.F.R. § 550.805(c)(1) (1982), and, therefore, was not entitled to backpay for the period October 19, 1980, to January 11, 1981. From the record it appears that Mr. Clark was not required to submit to a physical examination prior to returning to work on January 12, 1981.

Section 5596 of Title 5, United States Code (1976), states that an employee who has undergone an unjustified or unwarranted personnel action:

> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
>
> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period * * *

In *Schwartz* v. *United States,* 149 Ct. Cl. 145 (1960), the United States Court of Claims construed a similar statutory provision as requiring a claimant to secure other employment and requiring that the amount which the claimant earned or with reasonable effort could have earned is to be deducted from the total amount which would otherwise be due. This duty to mitigate, however, is somewhat limited. The court in *Schwartz* held that the employee was under no obligation to seek other employment while appellate administrative proceedings are in progress, and the employee is endeavoring to obtain reinstatement. The court found that the employee should be afforded ample opportunity to prepare for the hearings dealing with the agency's action. *Id.* at 148; *See also Power* v. *United States,* 220 Ct. Cl. 157, 168 (1979).

Our Office has concurred in this interpretation. In 41 Comp. Gen. 273 (1961), we considered a case where the employee was wrongfully separated, and, after a hearing, was ordered to be restored to duty, but the agency appealed the order. We held that the employee had reasonable grounds for not making an effort to secure other employment during the period of the separation, including both time awaiting the hearing and awaiting final decision. Although the employee in that case was not offered employment by the agency during the pending appeal, we find that the rationale of that decision also applies to the present case. If an employee, while not forced to seek work, is required to accept work if it is offered by the agency, the employee will no longer have the time to adequately prepare for any hearings contesting the agency's action. In any event, we note that the Navy in this case only offered Mr. Clark an unspecified temporary position which was conditioned upon the passing of a physical examination. Under these circumstances, we find that Mr. Clark was not obligated to accept the temporary employment offered by the Navy Department, since for the entire period of his separation he was either awaiting a hearing or awaiting a final decision on the agency's appeal. Consequently, the denial of backpay to Mr. Clark for the period October 19,

1980, to January 11, 1981, cannot be justified on the basis that Mr. Clark's refusal of temporary employment was unreasonable. Mr. Clark was under no obligation to accept the offer.

Although Mr. Clark was not required to seek alternate employment during the administrative appeal period, he may not receive backpay for any period during which he was not ready, willing, and able to perform his duties because of an incapacitating illness or injury. 5 C.F.R. § 550.805(c)(1) (1982). The Back Pay Act is designed to compensate employees for the pay they would have earned but for the wrongful separation, and if the employee is incapable of performing the work, he has lost nothing. *Everett* v. *United States,* 340 F. 2d 352 (Ct. Cl. 1965).

It is well established that the employee bears the burden of showing that he is ready, willing, and able to work in order to demonstrate his entitlement to backpay. *United States* v. *Wickersham,* 201 U.S. 390 (1906); *Seebach* v. *United States,* 182 Ct. Cl. 342 (1968); *Graves* v. *United States,* 176 Ct. Cl. 68 (1966). Our Claims Group determined that Mr. Clark failed to provide sufficient evidence for the period October 19, 1980, to January 11, 1981, showing that he was medically capable of performing his duties. However, we find nothing in the record which indicates that Mr. Clark's medical condition during the period October 19, 1980, to January 11, 1981, differed in any way from his medical condition during the period for which Mr. Clark was awarded backpay, or during the periods before his separation or after his reinstatement. In essence, the Navy award of backpay to Mr. Clark for the period January 12, 1980, to October 17, 1980, is an implicit finding that Mr. Clark was ready, willing, and able to perform his duties during that period. The record fails to disclose any affirmative evidence which would justify a finding that Mr. Clark would have been medically incapable of performing his duties for the remaining period of his separation.

Furthermore, the fact that Mr. Clark filed a disability application with the OWCP claiming a permanent disability is not dispositive of Mr. Clark's medical condition. It appears that Mr. Clark received no disability benefits during the entire period of his separation. Cf. *Cunningham* v. *United States,* 212 Ct. Cl. 451 (1977). Also, the application was filed on May 16, 1980, and indicates that the injury which forms the basis for Mr. Clark's disability claim occurred on December 14, 1978. Neither fact supports the finding that Mr. Clark was medically incapable of performing his duties during the period October 17, 1980, to January 11, 1981. Finally, we note that Mr. Clark has contended throughout the period of his separation that he was ready, willing, and able to work, and that, in fact, Mr. Clark did report to duty on January 12, 1981, did not take a physical examination, and worked without limitations until June 12, 1981.

On the basis of this evidence, we find that the denial of backpay to Mr. Clark for the period October 19, 1980, to January 11, 1981, cannot be sustained. Accordingly, our Claims Group decision is modified and Mr. Clark is entitled to an additional award of backpay for the period October 17, 1980, to January 11, 1981, with appropriate adjustments in annual and sick leave for that period.

Mr. Clark also disagrees with the formula applied by the Navy in determining his entitlement to overtime pay for the period of his separation. Under 5 U.S.C. § 5596, Mr. Clark is entitled to the pay he "normally" would have received, and this includes an estimate for the overtime work Mr. Clark would have performed but for the wrongful separation. However, there is no specific formula which is appropriate in all situations. We have held that the term "normally" suggests at least an administrative finding in each case that the facts support a reasonable probability that the employee would have performed duty for which compensation is payable. *William R. Simoneau,* B-198485, August 27, 1980; B-177315, December 12, 1972; B-163142, February 28, 1968.

In this case, the Navy awarded Mr. Clark overtime for the period of his wrongful separation based on the number of overtime hours he worked in 1979. It was determined that Mr. Clark was entitled to 8 hours of overtime for the period of his wrongful separation. Based on the evidence presented, we cannot say that the agency should have reached a different conclusion or utilized a different formula. Since we do award Mr. Clark backpay for an additional period, we find that Mr. Clark is entitled to have his overtime award recomputed to reflect this fact. However, in all other respects, Mr. Clark's claim for additional overtime is denied.

Mr. Clark argues that his award of overtime pay should be based on the overtime hours worked by other shipfitters during the time he was separated, rather than on the overtime he worked during the preceding year. He states that his overtime work for that year was limited because of his physical problems. However, since the record seems to show that his physical condition remained about the same during his separation as it had been the preceding year, it is not unreasonable to assume that his overtime would have been similarly restricted.

Mr. Clark has also claimed travel expenses in connection with his appearances at the MSPB. In this regard, we point out that there must be sufficient evidence to establish the validity of a claim against the Government before it can be paid. *See* 18 Comp. Gen. 980 (1939), 53 Comp. Gen. 181 (1973). Mr. Clark has not filed the appropriate forms to substantiate his claim. Consequently, we have no basis upon which to consider this claim. Mr. Clark, if he wishes to pursue this claim, should file the appropriate forms with the Puget Sound Naval Shipyard.

Accordingly, a settlement will be made in the amount found due for the payment of additional backpay to Mr. Clark.

[B-206973]

Transportation—Household Effects—Commutation—Actual Expenses *v.* Commuted Rate—Administrative Determination

Employee of Dept. of Energy made his own arrangements and shipped his household goods on Oct. 1, 1981, under travel orders which stated that the "method of reimbursing household goods costs to be determined." Agency obtained a cost comparison from General Services Administration (GSA) after-the-fact in Dec. 1981, and reimbursed employee for his actual expenses rather than the higher commuted rate. Under GSA regulation effective Dec. 30, 1980, agency's action was proper since its determination was consistent with the purpose of the new regulation; to limit reimbursement to cost that would have been incurred by the Government if the shipment had been made in one lot from one origin to one destination by the available low-cost carrier on a Government Bill of Lading. Decisions of this Office allowing commuted rate prior to effective date of GSA regulation will no longer be followed.

Transportation—Household Effects—Actual Expenses—Allowance Basis—Cost Comparison—Timeliness of Comparison

Employee who made his own arrangements and shipped his own household goods on Oct. 1, 1981, should not have his entitlement limited to the low-cost available carrier on the basis of a GSA rate comparison made 2 months after-the-fact. GSA regulations require that cost comparisons be made as far in advance of the moving date as possible, and that employees be counseled as to their responsibilities for excess cost if they choose to move their own household goods. However, cost of insurance must be recouped.

Matter of: John S. Phillips—Transportation of Household Goods—Actual Expenses, May 18, 1983:

This decision concerns the claim of Mr. John S. Phillips, an employee of the Department of Energy, for reimbursement of household goods shipping expenses under the commuted rate schedule. The issue to be decided is whether the agency acted properly in limiting reimbursement to the actual cost by commercial bill of lading in lieu of the commuted rate.

In sustaining the agency's action we will focus on a significant regulatory initiative by the Administrator of General Services and establish a precedent for prospective application in decisions of this Office.

BACKGROUND

Briefly, Mr. Phillips' original travel order stated, "method of reimbursing household goods costs to be determined." However, at the time the agency contacted him to make arrangements and determine the method of shipment, Mr. Phillips had already made his own determination and arrangements and had shipped his household goods on October 1, 1981. Mr. Phillips paid $1,714.11 to ship 12,440 pounds of household goods, including $125 for insurance.

In order to determine Mr. Phillips' rate of reimbursement the agency obtained a cost comparison from the General Services Administration (GSA) in December 1981. The agency reports that since "Mr. Phillips had made his own arrangements, we paid his

actual cost rather than the commuted rate for the maximum limit of 11,000 lbs. The commuted rate being much more than either the actual cost by commercial lading or the actual by Government Bill of Lading." As a result the agency reimbursed Mr. Phillips $1,515.69 representing the charges for shipping 11,000 pounds maximum weight including a proportionate share of the insurance. Mr. Phillips is reclaiming the difference between the amount reimbursed and the commuted rate of $2,743.40, or $1,227.71.

STATEMENT OF THE ISSUE

Our review of reimbursement authorities applicable to Mr. Phillips' claim focuses on Temporary Regulation A-12 of the Federal Property Management Regulations, which established the centralized household goods traffic management program. In connection with that program paragraph 6b of Temporary Regulation A-12 requires an agency to obtain from the nearest GSA regional office, a cost comparison of the two methods of reimbursing an employee for shipment of his household goods—the actual expense method, and the commuted rate method. Under the actual expense method the Government assumes responsibility, whereas under the commuted rate the employee makes his own arrangements. Agencies make the final determination as to the method of shipment to be used based on the cost comparison. More particularly, 41 C.F.R. § 101-40.203-2(b) of Subpart 101-40.2 "Centralized Household Goods Traffic Management," published on December 30, 1980, at 45 Fed. Reg. 85755, prescribes that when the actual expense method is authorized as the most economical means of shipment and the employee chooses to move all part of the household goods by some other means, reimbursement will be limited to the cost that would have been incurred by the Government if the shipment had been made in one lot from one origin to one destination by the available low-cost carrier on a Government Bill of Lading (GBL).

Decisions of this Office on claims arising before the December 30, 1980, effective date of 41 C.F.R. 101-40.2 do not permit comparative ceilings on commuted rate reimbursement. Recently in *Chester C. Bryant,* B-206844, July 7, 1982, we held that an employee who moved his household goods upon transfer in November 1979, and whose reimbursement was limited to the comparative cost of shipment by GBL, was entitled to reimbursement under the commuted rate. This followed from our determination that since the agency did not authorize and ship his goods, application of comparative actual expenses under a GBL as a ceiling was incorrect. In *Raymond C. Martin,* B-196532, July 7,1980, we were faced with a similar situation. An employee was authorized transportation of household goods on an actual expense basis via a GBL but the travel authorization was subsequently amended to allow the employee to move himself. The employee was reimbursed the actual out-of-

pocket expenses he incurred in the move, but he made a claim for the difference between his expenses and the cost of a move by GBL. We held that the agency was incorrect in reimbursing the employee on an actual expense basis stating that the employee should be reimbursed the commuted rate. We based our determination on *William K. Mullinax,* B-181156, November 19, 1974, in which we held that there is no authority for reimbursement to an employee on an actual expense basis unless his agency has both authorized and shipped his effects on a GBL. In that case we also held that if an employee cannot be reimbursed under the actual expense basis he is entitled to reimbursement under the commuted rate in order to preserve his right to reimbursement of the shipment of his household goods as conferred in 5 U.S.C. § 5724(a)(2) (1976). See also *Andres Villarosa,* B-201615, September 1, 1981. Thus in the past, our decisions have held that where household goods are not shipped on a GBL the commuted rate basis necessarily is for application to preserve the employee's rights under 5 U.S.C. § 5724(a)(2); we have said that an employee has a statutory right to the commuted rate in those circumstances.

NEW GSA REGULATIONS

In furtherance of our substantive review of this statutory entitlement issue we asked for the views of the Administrator of General Services regarding the regulatory initative for reimbursing household goods shipping expenses for employees who make their own transportation arrangements and whose goods are not shipped by GBL.

By letter dated January 5, 1983, the Director, Policy Development and Analysis Division, Office of Personal Property, GSA, responded to our request, in large part as follows:

> [T]he Administrator, through Executive Order 11609, has authority under 5 U.S.C. 5724 to prescribe regulations regarding the employee's entitlement to, and the Government's payment for, the expenses of transporting, temporarily storing, etc. the transferred employee's household goods between duty stations. Although there is no specific direction or prohibition as to the means of payment for these expenses, the terminology "payment of expenses" used in 5 U.S.C. 5724(a)(2) is generally interpreted to mean actual expense basis. The provisions of 5 U.S.C. 5724(c) deal with methods of payment stating that instead of being paid for the actual expenses of transporting, storing, etc., the employee shall be reimbursed on a commuted basis.
>
> While the legislative history indicates the term "payment of actual expenses" in 5 U.S.C. 5724(c) was intended to authorize the agency to use the GBL when the payment of actual expenses was found to be more economical than the commuted rate basis, we find no indication in the statute or legislative history which would prohibit the payment of actual expenses by means other than through the use of a GBL. Thus, when an agency authorizes actual expenses and the use of a GBL for the shipment of household goods and the employee makes his/her own arrangements, we find nothing which would preclude actual expense reimbursement to the employee. However, without a regulatory limitation to the GBL costs, actual expense reimbursement to the employee could become more costly than the commuted rate reimbursement.
>
> However, as provided in 41 CFR 101-40.203-2, when the employee chooses for personal reasons to ship his/her own household goods by some other means, actual expense reimbursement to the employee then becomes limited to the actual expense

amount that the shipment would have cost the Government had the agency shipped the household goods on a GBL, as authorized

Under the provisions of both 41 CFR 101-40.203-4 and paragraph 2-8.3c (4) (a) of the Federal Travel Regulations (FTR), the determination as to the use of the commuted rate or the actual expense method must be based on a cost comparison of the two methods. Although not specifically stated, this determination should be made by the agency in a timely manner, related to the employee, and reflected in the employee's travel authorization. These actions should be accomplished as far in advance of the employee's expected reporting date as possible so that adequate time is available to make carrier shipping arrangements and also so the employee is aware of his/her authorized allowances and any limitations or restrictions being placed on the allowance.

The regulations do not contemplate that an agency should obtain a cost comparison after the fact merely for purposes of limiting reimbursement to the employee. Unless some unusual circumstances are present in a particular case, the provisions of 41 CFR 101-40.203-2(b) should not be applied after a household goods shipment has been completed by the employee.

CONCLUSION

Federal agencies must act within the authority granted to them by statute in issuing regulations. However, as a general rule, published regulations are deemed to be within an agency's statutory authority and consistent with Congressional intent unless shown to be arbitrary or inconsistent with the statutory purpose, since the construction of a statute by those charged with its execution is to be followed unless there are compelling indications that it is wrong. See generally, 58 Comp. Gen. 635 (1979); 56 *id.* 943 (1977). Thus, we have reasoned that regulations which have properly been issued by an agency under a statutory grant of authority have the force and effect of law. See B-201706, March 17, 1981, citing 43 Comp. Gen. 516, 519 (1964).

In view of the above, and bearing in mind that our decisions requiring unlimited payment of commuted rate expenses where an employee is reimbursed under 5 U.S.C. § 5724(a)(2) were based on our interpretation of the authorizing statute and not an express requirement in the law, we find no basis to challenge the new GSA regulation. However, we agree with GSA that, under the circumstances of this case, the employee's reimbursement should not be limited to the lowest-cost carrier when a rate comparison is made after-the-fact.

Mr. Phillips was authorized shipment of his household goods on September 25, 1981, by a method of reimbursement to be determined later. His shipment was picked up on October 1, and delivered on October 3, 1981. The DOE did not obtain a GSA rate comparison until November 30, 1981, based on an estimated move date of December 2, 1981. However, GSA regulations require that requests for cost comparisons be made as far in advance of the moving date as possible (preferably 30 days). 41 C.F.R. § 101-402.203-4(b) (1981). Further, agencies are cautioned to counsel employees as to their responsibilities for excess cost if they choose to move their own household goods. See 41 C.F.R. § 101-40.203-2(c) (1981). Therefore, we do not believe that an agency rate determina-

tion made 2 months after the shipment was picked up and delivered should be used as a basis to limit the employee's entitlements to the low-cost available carrier. Nor do we believe that the employee should receive an entitlement above his actual costs. This would have the effect of nullifying the purpose of the new GSA regulations; to limit reimbursement to the cost that would have been incurred by the Government if the shipment had been made in one lot from one origin to one destination by the available low-cost carrier on a GBL. See 41 C.F.R. § 101-40.203-2(b) (1981). Decisions of this Office that allowed the commuted rate prior to the effective date of the GSA regulations will no longer be followed.

Accordingly, under the regulatory authority reviewed above which was applicable at the time of Mr. Phillips' household goods move, and where Mr. Phillips determined for personal reasons to make arrangements for and ship his own household goods, the agency properly limited reimbursement to his actual expenses.

Finally, the administrative record indicates that the agency reimbursed Mr. Phillips an additional amount as a "proportionate share of the insurance" on the shipment of his household goods. Mr. Phillips may not be reimbursed for the charge. Under para. 2-8.4e(3) of the Federal Travel Regulations FPMR 101-7 (May 1973), an employee may place a value on his household goods higher than the carrier's minimum insured valuation, but the cost of that added value is the employee's responsibility. *Joel T. Halop,* B-195953, June 5, 1980. Accordingly, such sums paid to Mr. Phillips must be recouped by the agency.

[B-209699]

Funds—Recovered Overcharges—Distribution—Department of Energy

In distributing funds under consent orders with alleged violators of petroleum price and allocation regulations, Dept. of Energy must attempt to return funds to those actually injured by overcharges. Where this is not possible, Energy must use mandatory procedure established by 10 C.F.R. 205.280 *et seq.*, which creates mechanisms for injured parties to claim refunds. Distribution of consent order funds by oil companies is not permissible without restitutionary nexus because Energy lacks authority to do indirectly what it cannot do directly. In-kind deposit of oil in Strategic Petroleum Reserve by oil companies is not permissible because it lacks restitutionary nexus and is not otherwise authorized.

Funds—Recovered Overcharges—Distribution—Department of Energy

Distribution of consent order funds to states by oil companies or Dept. of Energy is permissible only if states are required to use funds exclusively for energy-related purposes with restitutionary nexus to nature of overcharges, for benefit of class of consumers overcharged, and according to plans approved by energy. Any funds not able to be distributed by oil companies in appropriate restitutionary manner must revert to Energy for disposition under procedure in 10 C.F.R. 205.280 *et seq.* If no consumers or classes of consumers can be identified by administrative procedure, and no restitutionary nexus for payments to states can be found, only remaining

authorized distribution is deposit of funds in miscellaneous receipts account of Treasury.

Matter of: Department of Energy use of consent orders to distribute petroleum overcharge settlement funds, May 19, 1983:

This decision to the Secretary of Energy results from a request of the Chairman, Oversight and Investigation Subcommittee, House Committee on Energy and Commerce, that we examine the validity of and continued use by the Department of Energy (Energy) of various provisions in consent orders with producers of petroleum products, by which Energy has been making or permitting the producers to make direct distribution of overcharge settlement funds to parties who have no clear connection to the overcharges which gave raise to the settlements. The purpose of the consent orders is to settle alleged violations of Federal petroleum price and allocation regulations through payments by the producers, the amounts of which were arrived at by negotiation with Energy's Economic Regulatory Administration or Office of Special Counsel.

We previously have issued to the chairman two opinions on the question of appropriate distributions of overcharge refunds, 60 Comp. Gen. 15 (1980) and B-200170, April 1, 1981, and we now have been requested to issue this decision to inform Energy of our position regarding its current actions under consent orders.

We have examined the relevant legislation, case law, regulations and other related materials, including summaries of numerous consent orders published in the FEDERAL REGISTER, and we also obtained Energy's views on this matter. In our opinion, Energy has been using consent orders improperly in a number of cases by making or allowing the oil companies to make distribution of overcharge refunds without prior efforts to identify those overcharged and the amounts of overcharges. As a result, payments have been made by oil companies and by Energy to institutions that were not actually injured by the overcharges, and that lack an appropriate connection to the overcharges. Further, and more importantly, overcharged customers have been denied an opportunity to present claims through Energy's established procedures.

In large part, our conclusion is founded on our prior opinions, particularly on their analysis of Energy's restitutionary authority, and on the holding that Energy is legally bound to follow its own regulations which require that certain administrative procedures be followed in determining appropriate restitutionary distribution mechanisms for individual or classes of injured consumers not readily identifiable. Subsequent judicial decisions addressing Energy's restitutionary authority and the validity of certain consent order provisions it has negotiated do not address the specific issues with which we are concerned, but in our view they lend additional support to our conclusions, as will be discussed below.

Prior GAO Opinions on Energy's Restitutionary Authority

In our two previous opinions dealing with the authority of Energy to distribute the overcharge refunds it has received under consent orders with Getty Oil Company and other producers of petroleum products, we stated that Energy has limited, implied restitutionary authority to distribute the funds only to consumers injured by the overcharges, or to classes of consumers with a connection to the overcharges.

In our first opinion, 60 Comp. Gen. 15 (1980), we reviewed the legality of plans by Energy to distribute $25 million in overcharge refunds it obtained under the terms of a consent order with Getty. We examined the distribution plan in light of the terms of the settlement, the pertinent legislation and regulations under which Energy carried out enforcement of the price and allocation controls on petroleum products, and the nature and scope of restitutionary authority available to Energy. On the basis of this analysis, we concluded that Energy could not lawfully implement its proposed distribution of the funds to defray the heating oil costs of low-income persons without regard to their status as former heating oil customers of Getty, both because the plan did not effect restitution to the entire class of purchasers injured, and because Energy failed to follow its own mandatory regulations which set forth procedures to allow persons allegedly injured by the overcharges to present their evidence and establish their claim.

The Getty Consent Order contained no provision controlling the distribution of the $25 million refund. Energy proposed to make "restitution" by distributing the bulk of the funds to states where Getty presently has heating oil customers, to be used to assist low-income users of heating oil, with the balance of the funds to be distributed to lower grade members of the armed services currently residing in those states.

Energy asserted that its restitutionary authority included the power to take any action necessary to eliminate or compensate for the effects of a violation of its petroleum price and allocation regulations. However, in analyzing Energy's implied power to order restitution as a remedy for violation of the regulations, we determined that "Energy's remedial authority is limited to ordering a violator to make refunds to overcharged customers." 60 Comp. Gen., *supra* at 20.

We examined the distribution plan for the Getty funds in light of our view of Energy's restitutionary authority. We concluded:

> In order for any distribution of the Getty funds to satisfy the statutory and regulatory requirements for restitution, it must be made in approximate proportion to the injury actually sustained to Getty customers and to ultimate consumers of Getty products who were the victims of the overcharges. 60 Comp. Gen., at 22.

On the other hand, we recognized

> * * * that it is frequently not possible to identify each individual customer or consumer who has been overcharged nor is it always possible to make a precise deter-

mination of the amounts each individual has been overcharged. So long as a good faith effort was made to identify overcharged individuals, we would not view a distribution scheme which lacked dollar for dollar precision as unauthorized. However, the Energy distribution scheme in the Getty case does not sufficiently relate distributees to those injured to support a finding of restitution. 60 Comp. Gen., at 24.

We believed at the time this opinion was issued that within these guidelines, Energy had ample flexibility to develop appropriate, innovative distribution plans for the funds. We still believe so.

In our opinion of April 1, 1981, B-200170, reviewing the legality of subsequent distribution proposals by Energy's Office of Hearing and Appeals (OHA), where it appeared to be difficult or impossible to identify injured purchasers, we again emphasized the necessity in any appropriate restitutionary distribution plan of a sufficient relationship between the recipients of disbursements and the persons actually overcharged.

No authority is expressly granted to energy—or to the administrative components of Energy responsible for the price and allocation program—to promote the interests of consumers in general through direct payments to them or through grants made on their behalf to states or other entities. April opinion, p. 9.

We also reiterated that adequate flexibility is built into Energy's restitutionary authority.

The statutory framework under which Energy operates was set out in 60 Comp. Gen., *supra,* at 18-21, and need not be described in detail here. We pointed out that the only specific grant of restitutionary power in that legislation is found in section 209 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904 note, and is limited to actions which can be taken by the United States District Courts. 60 Comp. Gen., *supra,* at 18-19. We also stated that *Bonray Oil Co.* v. *Department of Energy,* 472 F. Supp. 9 (W.D. Okla. 1978), *aff'd per curiam,* 601 F.2d 1191 (TECA 1979),"only confirms Energy's authority, as part of a remedial order which determines that violations have occurred, to order the violator to return overcharges directly to its customers."

DISCUSSION

In a copy of a memorandum delineating its view of its legal authority to structure remedies, provided to us by the Administrator of Energy's Economic Regulatory Administration, Energy relies on *Bonray, supra,* on *Sauder* v. *Department of Energy,* 648 F.2d 1341 (TECA, 1981), and on *Citronelle-Mobile Gathering, Inc.* v. *Edwards,* 669 F.2d 717 (TECA, 1982), as authorizing the broad grant of restitutionary power that it has been exercising in recent consent order settlements. As noted above, we believe that *Bonray, supra,* indicates that Energy's authority is limited to making refunds to overcharged customers.

In *Sauder, supra,* the court stated that section 209 does not limit the courts or the agency to "restitution or to a particularly strict interpretation of restitution," but went on to state, that "[w]e do

not grant the agency 'carte blanche,' * * * but merely enforce its effort sanctioned by the statute and its purposes, 'to set things right.'" *Sauder, supra* at 1348–49. In *Sauder*, the Court held only that Energy had sufficient restitutionary authority to order one of several joint oil well owner-operators to make refunds of all the owner-operators' overcharges even though that owner-operator had not received all of the overcharged amounts. *Sauder* did not, however, provide for distribution of overcharged amounts to other than overcharged customers, using the term "refund" to denote the amount to be disgorged by the plaintiff. *Sauder, supra* at 1349. (It should be noted that both of these cases involved litigation arising from actions taken under Energy's administrative procedures for the enforcement of remedial orders, 10 C.F.R. Subparts O and H, §§ 205.190 *et seq.*, 205.100 *et seq.*, and not from consent orders agreed to by the parties.)

In our April opinion we disussed the decision of the district court in *Citronelle-Mobile Gathering, Inc.* v. *O'Leary,* 499 F. Supp. 871 (S.D. Ala. 1980), in which the court ordered that restitution be made to the United States Treasury since the court could not envision a formula which could meaningfully distribute available funds to the millions of consumers injured by the various defendants' acts. See *Citronelle, supra,* 499 F. Supp. at 866; April GAO opinion at 11. In the subsequent appellate decision in that case, *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717 (TECA, 1982), the court emphasized that enforcement actions under section 209 are taken "to enforce public, not private rights," and that "the central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount." *Citronelle* v. *Edwards, supra,* 669 F.2d at 722. On the question of distribution, of the amounts placed in the Treasury, the appellate court stated—

> Suffice it to note that the Government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds. Id., at 723.

We fully agree with the statement of Energy's duty to attempt to identify overcharged customers so that overcharge funds deposited in escrow accounts may ultimately be distributed. We also agree that where it is possible to determine the purchasers of overpriced oil, and through these to attempt to locate consumers ultimately overcharged as a result, "[i]t follows that payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved." *Id.*, at 722. In our view, however, *Citronelle v. Edwards* does not preclude payments to the general funds of the Treasury when other restitutionary mechanisms are not appropriate, or have been tried without success, since these situations were not addressed by the court.

SUBSEQUENT DEVELOPMENTS

Section 155 of Pub. L. No. 97-377, 96 Stat. 1830, December 21, 1982, providing further continuing appropriations for fiscal year 1983, permitted a one-time distribution to the states of up to $200 million from the over $500 million in settlement funds deposited in Department of the Treasury escrow accounts as of December 17, 1982. The purpose of section 155 was:

> * * * to provide the Secretary of Energy the exclusive authority for the disbursement of the designated petroleum violation escrow funds for limited restitutional purposes (1) which are reasonably expected to benefit the class of persons injured by such violations, and (2) which * * * are likely not to be, through procedures established by regulation, otherwise refunded to injured persons because the purchasers of the refined petroleum products cannot be reasonably identified or paid or because the amount of each purchaser's overcharge is too small to be capable of reasonable determination. Pub. L. No. 97-377, § 155(a).

The funds are to be distributed to the governor of each state with each state's payment based on its share of nationwide consumption of refined petroleum products from 1973 to 1981. *Id.*, § 155 (c), (d). The escrow funds to be disbursed may not include those designated for OHA proceedings under Subpart V of Energy's regulations and must be consistent with the remedial or consent order covering the funds. *Id.* § 155(e)(i). The states must use the funds under one or more of 5 energy conservation programs set forth in subsection (e)(2), and none of the funds may be used to defray administrative expenses of Energy or of any state. *Id.* 155(f).

The history of section 155, and its location in a temporary continuing resolution, clearly indicate that it was intended to authorize Energy to follow a similar distribution formula in disbursing escrow funds in subsequent fiscal years even though it may be unable to identify overcharged customers readily. The provision, then designated amendment 110, was defined as "a one-time distribution" in the explanatory statement to the conference report, H.R. Rep. No. 97-980. Further, in floor debate on the provision, Rep. Dingell stated as follows:

> The provision is a one-time provision. It should not be viewed as a precedent. It does not confer on DOE any new restitutional or remedial authority or imply that the DOE has such authority. It is a very limited provision aimed at helping people. It is, I stress, an exclusive, one-time disbursement authority. 128 Cong. Rec. H. 10435 (daily ed. December 20, 1982).

The fact that section 155 was considered necessary by the Congress in order to authorize distribution of escrow funds when it was not possible to determine who was actually overcharged provides further support for our position that Energy cannot make such distributions in the absence of similar statutory authority.

In the most recent judicial decision on the issue of disbursement of escrow settlement funds, the district court used section 155 as a model for the equitable remedy it provided. *United States* v. *Exxon Corporation*, Civil Action No. 78-1035, (D.D.C., filed March 23, 1983). In its opinion, the court found Exxon liable for substantial

overcharges under the crude oil entitlements program, and held that under that program the cost effects of Exxon's wrongdoing were so widely dispersed throughout the country as to make it impossible to trace the overcharged persons and to calculate the extent of injury of each. *Id.*, advance sheets at 77.

This court also pointed out that the court in *Citronelle* v. *Edwards, supra*, did not preclude restitutional payments into the Treasury, but based on the facts in that case, where identification of the overcharged persons was possible, ordered further action to identify them and to distribute the funds initially placed in the Treasury. When, as in the *Exxon* case, overcharges are diffused nationwide, and individualized losses could never be determined accurately, the court held that it was "not precluded on the facts before it from ordering Exxon to make restitution to the Treasury." *Exxon*, *supra*, advance sheets at 81-82. In this case, however, the court ordered *Exxon* to make restitution of the overcharges, plus interest, to the Treasury for deposit in an escrow account, and additionally exercised its equitable powers and restitutionary authority under section 209 of the Economic Stabilization Act, *supra*, to order Energy to make disbursements from this fund in accordance with the distribution plan set forth in section 155. *Id.*, at 83-85.

Subpart V Regulations for Distribution of Refunds Made to Energy

In our two previous opinions dealing with the distribution of overcharge refunds, we set forth our analysis of the regulations promulgated by Energy which establish procedures for the distribution of these funds by Energy when the recipients or amounts of refunds cannot be readily identified. In our first opinion, we pointed out that Energy's Subpart V regulations, 10 C.F.R. §§ 205.280-205.288, are statutory regulations designed for the protection of the rights of overcharged consumers, that they are binding upon Energy, and that as a result, the procedures established in the regulations are mandatory. 60 Comp. Gen., *supra* at 26. These procedures provide, among other things, for publication in the *Federal Register* of notice of Subpart V proceedings, the solicitation of public comments, and the solicitation of claims.

The scope of Subpart V is set forth in the regulations:

> This subpart establishes special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart *shall be applicable* to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive. (10 C.F.R. § 205.280). [Italic supplied.]

In our April opinion we determined that the mandatory language of this provision, underlined above, was clearly intended by Energy, since it prevailed over a more flexible provision originally proposed. April opinion, at 4.

We continue to believe that these procedures are mandatory and that Energy therefore is required to present to OHA for disposition every case where the appropriate recipients or amounts of overcharge refunds cannot be determined readily by Energy or the oil companies. The importance of this procedure is that it assures that customers actually overcharged will have an opportunity to have their claims considered before other methods of distribution are used.

For these reasons, we hold that whenever settlement funds cannot be distributed readily to identifiable overcharged consumers or classes of consumers, Energy lacks authority to agree to a consent order provision that distributes overcharge settlement funds directly, or in which distribution is to be made by the oil company, without first attempting to find claimants through OHA proceedings.

Energy's Authorized Remedial Actions

Energy has available to it a range of remedial actions it may take to enforce compliance with its programs. The scope of these actions is set forth in Energy's regulations as follows:

> (a) A Remedial Order. A Remedial Order for Immediate Compliance, an Order of Disallowance, or a Consent Order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under DOE Regulations, to make appropriate compensation to third persons for administrative expenses of effectuating appropriate remedies, and to take such other action as the DOE determines is necessary to eliminate or to compensate for the effect of a violation * * *. Such action may include a direction to the person to whom the Order is issued to establish an escrow account or take other measures to make refunds directly to purchasers of the products involved notwithstanding the fact that those purchasers obtained such products from an intermediate distributor of such person's products, and may require as part of the remedy that the person to whom the Order is issued maintain his prices at certain designated levels notwithstanding the presence or absence of other regulatory controls on such person's prices. In cases where purchasers cannot be reasonably identified or paid or where the amount of each purchaser's overcharge is incapable of reasonable determination, the DOE may refund the amounts received in such cases directly to the Treasury of the United States on behalf of such purchasers. 10 C.F.R. § 205.199I.

This provision makes it clear that the intended result of these remedial actions is to ensure compliance with Energy's regulations by requiring some form of restitution to overcharged consumers by violators. As an alternative to paying the amounts of the overcharges to Energy, leaving Energy to make restitution from the funds so received, parties who are alleged to have overcharged may be ordered to roll back prices, make refunds themselves, or take other, similar actions. See 60 Comp. Gen. at 21.

As indicated, a consent order is one tool available to Energy to effect restitution. Energy's regulations governing the contents of consent orders provide:

> (a) Notwithstanding any other provision of this subpart, the DOE may at any time resolve an outstanding compliance investigation or proceeding * * * with a Consent Order. A Consent Order must be signed by the person to whom it is issued, or a duly

authorized representative, and must indicate agreement to the terms contained therein. A Consent Order need not constitute an admission by any person that DOE regulations have been violated, nor need it constitute a finding by the DOE that such person has violated DOE regulations. A Consent Order shall, however, set forth the relevant facts which form the basis for the Order. 10 C.F.R. § 205.199J.

The lack of specific requirements for the contents of consent orders is consistent with the nature of consent orders, which are individualized "product[s] of negotiation and compromise in which each party gives up something they might have won in litigation." *Consumer Energy Council of America* v. *Duncan,* 4 Energy Mgmt (CCH) 26,314, at 28,417. Energy's decision to settle a case or close an investigation with a consent order is within the discretion of agency officials, and is not judicially reviewable. *U.S. Oil Co., Inc.* v. *Department of Energy,* 510 F. Supp. 910, 914-915 (E.D. Wisc., 1981); *Consumer Energy Council of America, supra.*

Similarly, the terms of consent orders generally are not reviewable, although there is a limited statutory exception under section 211 of the Economic Stabilization Act, 12 U.S.C. § 1902 note, which permits judicial review of Energy's final orders. The scope of review under this section is very narrow, allowing only the determination of whether the terms of the consent order exceed the agency's authority. *State of Minnesota* v. *Standard Oil Co.* (Indiana), 516 F. Supp. 682, 689-90 (D. Minn., 1981). The wisdom or fairness of particular provisions may not be questioned, but it is appropriate to examine these provisions to determine whether Energy has the authority to agree to them at all. *Id.* at 691, f. 7. To determine whether Energy has, in fact, included unauthorized distribution mechanisms in consent order provisions, we examined a randomly selected group of notices of proposed and final consent orders that were published primarily during 1982 in the *Federal Register,* the place and form in which most of the consuming public would be made aware of the settlements. The *Federal Register* documents also contain statements summarizing comments received about proposed consent orders, as well as Energy's responses to these comments. In most cases, these responses outline the legal or policy basis for various actions taken by Energy and are useful in analyzing the distribution mechanisms selected in each instance.

As can be seen in the attached Appendix [not included in this publication] we examined proposed or final consent orders with sixteen companies engaged in various aspects of the petroleum industry, involving over $86 million in settlement payments. As will be discussed below, in many instances the orders establish refund mechanisms which we think Energy is not authorized to agree to. Some involve payments to be made directly to states by oil companies, with no requirement that the money be used only for restitutionary purposes.[1] Others require payments to Energy to place the

[1] Standard Oil Co. (Ohio), 47 F.R. 49705, Nov. 2, 1982, and Imperial Refineries Corp., 47 F.R. 53094, November 24, 1982.

funds in the U.S. Treasury miscellaneous receipts account without prior use of its Subpart V procedures. [2] A third form of disposition calls for the companies to deposit oil in the Strategic Petroleum Reserve.[3] In each such case the funds or the oil are to be distributed with no prior effort to identify and make refunds to purchasers who might be able to prove they were harmed by the questioned activities of the companies.

Energy's Use of Consent Orders To Permit Oil Companies To Distribute Overcharge Settlement Funds Themselves

In our view, Energy does not have authority to agree to consent order provisions which permit oil companies to distribute agreed upon amounts of funds or to agree to other procedures in a manner which exceeds Energy's own authority to distribute the refunds itself. In other words, if there is no restitutionary nexus, the fact that no funds come into the Government's possession is not sufficient to legitimize a distribution scheme. In such situation, Energy's only recourse is to provide for payments to a Treasury escrow account, pending OHA consideration under Subpart V. We do not mean to suggest that Subpart V applies to oil companies, or, as discussed below, that oil company distributions are inappropriate in all circumstances. However, if overcharged purchasers cannot be identified with reasonable accuracy, oil companies should not be authorized to distribute refund amounts.

An example of the failure to attempt to identify overcharged purchasers is seen in explanatory documents rationalizing consent order provisions mandating in-kind payments of oil to the SPR where Energy refers particularly to the Entitlements Program, which dispersed the effects of crude oil pricing violations nationwide, and states that payment to the SPR is the equivalent of depositing the funds in the U.S. Treasury as miscellaneous receipts. *Champlin Petroleum Co., supra,* 47 F.R. 49704; *Conoco, Inc., supra,* 47 F.R. 497020. The Conoco documents also contain Energy's stated purpose in adopting the SPR remedy:

> [T]his remedy is intended to benefit, albeit indirectly, consumers of petroleum products nationwide by adding to the Reserve to protect against future disruptions in foreign crude oil supplies. Conoco, *supra,* 49702.

This admittedly lacks any connection with overcharged customers of Champlin and Conoco products, and cannot be considered a restitutionary distribution. Even if this intended indirect benefit to consumers in general were somehow acceptable as restitution, we believe Energy lacks any authority to order such payments into the SPR absent specific legislative authority to do so.

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[2] John L. Cox, 47 F.R. 36887, August 24, 1982, Carter Foundation Production Co., 47 F.R. 36886, August 24, 1982, ($700,000); Amerada Hess Corp., 47 F.R. 55265, December 8, 1982, and Santa Fe Energy Co., 47 F.R. 42434, September 27, 1982.

[3] Conoco, Inc., 47 F.R. 49700, November 2, 1982, Quaker State Oil Refining Corp., 47 F.R. 38968, September 3, 1982, and Champlin Petroleum Co., 47 F.R. 49703, September 2, 1982.

Similarly, unrestricted distribution of consent order funds by companies to states on the basis of the percentage of use by states of petroleum products, with no attempt to provide restitution to specific overcharged customers, also exceeds Energy's restitutionary authority. The payments of escrow funds to states for energy related projects which admittedly do not have a restitutionary nexus were held to be unauthorized by our October 10, 1980 opinion. As stated earlier, the fact that legislation was required to provide for non-restitutionary distribution to states in Public Law No. 97-377 reflects congressional recognition of this lack of authority absent legislative authority.

While no funds come into the Government's possession under the terms of the consent orders here under consideration, this does not serve to overcome the lack of any restitutionary nexus to overcharged customers in such unrestricted payments. Energy cannot permit the companies to do indirectly what Energy can not do directly.

This is not to say that oil companies can never distribute overcharge refunds directly. In many instances, the oil companies are in the best position to identify the overcharged purchasers and to determine the amount of the overcharges. In these cases, where the companies and Energy are both satisfied that a clear restitutionary nexus has been established by means of fair and open procedures, we believe that a consent order can provide for direct payments to these identified consumers without the need for a formal administrative procedure. Energy should encourage the companies to undertake such efforts, and to develop payment mechanisms best suited for each of these purchasers. For example, some of the consent orders we examined established constructive claims funds for ultimate distribution by the companies, supervised by Energy, to overcharged customers. We conclude that these are within Energy's restitutionary authority. We do not mean to imply that the companies have carte blanche in distributing funds. Consistent with its own authority, Energy must ensure that consent orders require that the procedures to be used are reasonable, fair, and enforceable, and that the distribution plans adopted by the companies are in fact restitutionary. Thus, for example, states may be appropriate recipients of funds from companies, but only if they are required to use the funds exclusively for purposes clearly connected to the nature of the overcharges, for the benefit of the class of consumers overcharged, and according to plans approved by Energy. There must also be a provision that any funds not able to be distributed in this manner revert to Energy for appropriate disposition through OHA.

Concerning the establishment by oil companies of constructive claims funds or other restitutionary distribution mechanisms, in our April 1, 1981 opinion, we stated:

Our decision is not intended to foreclose the options available to Energy in negotiating future consent orders. * * * Energy may still negotiate consent agreements that provide for the establishment by the oil company of a trust or other entity to carry out agreed-upon projects or activities, *provided the project is one that may lawfully be agreed to by Energy,* and will not be financed by appropriated funds or overcharge funds held in escrow. [Italic supplied.]

We believe the distribution mechanisms just discussed fall within the intent of this statement.

In summary, a consent order may authorize direct distribution of overcharge funds by an oil company to identifiable customers without the establishment of an escrow fund provided that Energy approves the distribution plan, and so long as any funds not able to be so distributed revert to Energy for appropriate distribution through OHA procedures.

If, however, the oil companies are unwilling or unable to make the restitutionary distributions discussed above, then Energy is only authorized to agree to consent order provisions requiring payments to Energy to be held in escrow pending Subpart V disposition.

Energy's Direct Distribution of Funds Under Consent Orders

The consent orders we examined also contained numerous provisions for distributions to be made by Energy with no prior attempt to identify and make payments to overcharged consumers or appropriate classes of consumers. This is illustrated by the consent orders requiring Energy to deposit sums of money directly in the Treasury miscellaneous receipts account,[4] and in those requiring unrestricted payments to states.[5] Energy lacks authority to agree to these provisions, since, as stated previously, the Subpart V regulations are mandatory for Energy where overcharged purchasers have not been or cannot be identified.

In other words, whenever there is any question as to the identity of the recipient or the amount of payment, then the case must be referred to OHA.

The court in *Citronelle* v. *Edwards, supra,* stated that even where "millions of customers along the east coast" have been overcharged, "the Government has a *duty* to try to ascertain those overcharged, and refund them with interest, from the restitution funds" (italic in original). Additionally, contrary to Energy's frequent assertions that identification of purchasers is impossible in cases where programs had national cost effects, recent OHA decisions in consent order cases have established refund procedures in cases where overcharges affected virtually all users of petroleum products and where petroleum products passed through many hands before reaching the ultimate consumer. See, *e.g., Amoco*

[4] See footnote 2, *supra.*
[5] U.S.A. Petroleum Corp., 47 F.R. 50084, November 4, 1982, and Time Oil Company, 48 F.R. 325, January 4, 1983.

Brand Committee, et al., case No. HEZ-0137 (March 2, 1983); *Standard Oil Company (Indiana),* case No., BFF-0007 (January 3, 1983).

In the *Amoco Brand Committee* case, OHA acknowledged the difficulty of determining injury on the part of participants in the Entitlements Program. Nevertheless, claims were accepted from Entitlement Program participants, and the OHA, in fact, allowed refunds to a number of the claimants.

The *Standard Oil Company (Indiana)* case provided formulas for distributing some $100 million to various downstream users of petroleum products on a volume of historical use basis and solicited Applications for Refund from such users. Although the decision and order proposed a secondary distribution procedure which would provide funds remaining after resolution of claims to states in which petroleum products were sold, it clearly stated that any funds distributed to states could only be used in accordance with state plans, to benefit users of such products within the states. Thus, distribution to states in this case "would have a sound restitutionary basis," according to OHA.

After cases are referred to OHA, it is our view that payments to states as a result of Subpart V proceedings still should be made on a restitutionary basis according to approved state plans for programs clearly connected to the nature of the overcharges and the class of injured consumer. If, after Subpart V proceedings, no consumers or classes of consumers can be identified, and no restitutionary nexus for payments to states can be found, then deposit of overcharge funds in miscellaneous receipts is the only remaining authorized disposition. This is appropriate only as a last resort disposition, because while these funds are theoretically available for later appropriation by the Congress for energy-related grant programs, as was done by section 155 of Public Law No. 97-377, they are no longer available for refund to overcharged customers. While deposit in miscellaneous receipts after Subpart V proceedings have failed to find a more appropriate restitutionary remedy is authorized, the recent OHA decisions discussed above suggest that more direct restitutionary remedies can, in fact, be devised.

CONCLUSION

Our analysis of recent actions by Energy in settling cases with alleged violators of Federal petroleum price and allocation regulations leads us to conclude that Energy has been using consent orders improperly in a number of cases by allowing the distribution of overcharge refunds without prior efforts to identify those overcharged and the amounts of overcharges. As a result, payments have been made by oil companies and by Energy to institutions that were not actually injured by the overcharges, and that lack a clear connection to the nature of the overcharges or the class of

persons injured. In our view, these actions exceed Energy's statutory authority to enforce compliance with its regulations.

Where oil companies or Energy are capable of identifying those injured by the overcharges, and of establishing a restitutionary nexus between the nature of the overcharges and the proposed recipients of the funds, a consent order can provide for direct payments to these parties (including states, with appropriate restrictions and safeguards) by the companies or by Energy, without the need for a formal administrative procedure. Energy must insure, however, that the consent orders require identification and distribution procedures that are reasonable, fair, enforceable, and restitutionary in fact. There also must be a requirement, as one of the terms of the consent order, that any funds not able to be distributed in a restitutionary manner revert to Energy for appropriate disposition through OHA.

We reaffirm our prior opinion that in all cases where those overcharged cannot be identified or payments calculated, Energy is legally bound by its Subpart V regulations to provide administrative procedures to determine appropriate restitutionary distribution mechanisms, requiring in all cases that an attempt be made to identify overcharged customers and to calculate the payments to be made to them. In our view, Energy is entirely without authority to avoid its Subpart V procedures by agreeing to consent order provisions that distribute settlement funds directly, without prior efforts to locate injured parties, to states, to the miscellaneous receipts account of the U.S. Treasury, to the Strategic Petroleum Reserve, or to other entities not actually injured by the overcharges that gave rise to the companies' settlements.

Under the Subpart V procedures, if OHA can identify injured consumers or classes of consumers, and thus establish the necessary restitutionary nexus, it can order payments to these parties, including states, provided that in the latter case appropriate restrictions and safeguards insure that the funds returned to the consumers or classes of consumers will be used in accordance with the OHA determination.

We also reaffirm our previous opinion, now supported further by recent judicial decisions, that the only practical distribution plan available to OHA for funds remaining after all potential overcharged parties have been located and paid is to deposit them in the Treasury as miscellaneous receipts and leave further distribution to the Congress. If Energy feels that this is too restrictive a result, it should consider requesting statutory authority to broaden its restitutionary powers to permit a wider range of permissible payments.

[B-208183]

Travel Expenses—Constructive Travel Costs—Computation

Because of medical condition affecting employee's eardrums, he was unable to travel by air to a temporary duty station. Instead of traveling by train, he chose to travel by privately owned vehicle, with reimbursement limited to constructive cost of travel by common carrier. Since travel by air was not available to employee, the "appropriate" common carrier transportation under FTR para. 1-4.3 was rail transportation, and the constructive cost of rail rather than air transportation is thus applicable.

Leaves of Absence—Traveltime—Excess—Annual Leave Charge

Where employee, who traveled by privately owned vehicle as a matter of preference and took additional time away from his official duties, is to be reimbursed at the constructive cost of rail transportation, the employee's annual leave may be charged for the work hours involved in the trip exceeding those hours which would have been required had he used rail transportation.

Matter of: Timothy W. Joseph—Travel Expense—Privately Owned Vehicle—Constructive Cost, May 20, 1983:

The issue presented is whether air travel or rail travel is to be used as the proper constructive cost of common carrier transportation when an employee traveled by private automobile in lieu of common carrier.

This decision is in response to a request for an advance decision from Raymond E. Wolatz, an authorized certifying officer of the Department of Energy (DOE), Chicago Operations Office. His request involves a claim by a DOE employee, Dr. Timothy W. Joseph, for reimbursement of expenses he incurred in using his privately owned vehicle (POV) in lieu of common carrier while on temporary duty travel. For the reasons stated below, we hold that under the circumstances of this case, reimbursement is to be set at not more than the constructive costs Dr. Joseph would have incurred had he traveled by train.

Dr. Joseph was scheduled to attend a Hazardous Waste inspection at Brookhaven National Laboratory, in Upton, New York, on October 8, 1981. Because of a serious medical condition involving his eardrums, he had been advised by his doctor not to travel by air until the condition had cleared up. Since he could not fly, the agency determined that travel by rail would be the acceptable alternative. Dr. Joseph, however, chose to drive rather than take the 27-hour train trip, and he assumed that his reimbursement would be compared to rail travel. His travel orders permitted travel by "privately owned vehicle at the rate of 22.5 cents per mile provided total cost does not exceed cost of travel in common carrier."

He left his residence in Plainfield, Illinois, on October 3, 1981, and arrived at his hotel on Long Island on October 7. The traveltime was extended because of a few stops along the way for personal reasons. The official business was taken care of on October 8. Dr.

Joseph arrived back at his residence on the evening of October 9, 1981.

According to the information supplied by the certifying officer, had Dr. Joseph traveled by air, his reimbursable expenses would have totaled $322.67, and had he taken rail transportation, they would have totaled $551. In fact Dr. Joseph's actual expenses for travel by privately owned vehicle totaled $572.02. He contends that, since his physician prohibited his travel by airplane, reimbursement for his travel expenses should not be limited to the constructive cost of air transportation, including the constructive per diem by that method of transportation, but rather should be limited to the constructive cost of rail transportation, including constructive per diem.

The certifying officer maintains, however, that the comparison should be made against air transportation based upon the Department of Energy travel manual and paragraph 1-4.3 of the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR). Additionally, the certifying officer contends that all normal work hours involved in the trip in excess of the work hours that would have been required had the trip been made by use of air transportation should be charged to the employee's annual leave account. The certifying officer requests our determination of the appropriate constructive cost method and the appropriate charge to the employee's annual leave.

The first issue for determination is whether Dr. Joseph is entitled to be reimbursed on the basis of the constructive cost of air travel or rail travel. Paragraphs 1-2.2c(3) and 1-2.2d of the FTR subject reimbursement for the use of a privately owned vehicle for official travel to the constructive cost restrictions enumerated in paragraph 1-4, unless a determination has been made that common carrier transportation or Government-furnished vehicle transportation is not available or would not be advantageous to the Government. Paragraph 1-2.2d, FPMR Temp. Reg. A-11 Supp. 4 (1977), states:

> When an employee uses a privately owned conveyance as a matter of personal preference and such use is compatible with the performance of official business, although not determined to be advantageous to the Government under 1-2.2c(3), such use may be authorized or approved provided that reimbursement is limited in accordance with the provisions of 1-4.

Since there is no dispute that common carrier transportation was available by both air and rail and Dr. Joseph's travel authorization clearly shows that the agency determined that use of a private vehicle was not advantageous to it, paragraph 1-4.3 controls here. Paragraph 1-4.3 of the FTR provides, in pertinent part:

> Whenever a privately owned conveyance is used for official purposes as a matter of personal preference in lieu of common carrier transportation under 1-2.2d, payment for such travel shall be made on the basis of the actual travel performed, * * * plus per diem allowable for the actual travel. The total allowable shall be limited to the total constructive cost of *appropriate* common carrier transportation including constructive per diem by that method of transportation. [Italic supplied.]

In the instant case, while there is no dispute that airplane service was "provided" between Dr. Joseph's place of origin and destination, it is equally clear that airplane travel could not be used by Dr. Joseph due to his medical condition. In this situation the reference in paragraph 1-4.3 of the FTR to "appropriate" common carrier transportation must be construed to mean rail transportation. Although paragraph 1-4.3a indicates that the comparison should be made to the constructive cost by airplane, this regulation did not contemplate the situation found here where, for medical reasons, airplane service cannot be used, and thus in effect is not "provided." Accordingly, we hold that Dr. Joseph's medical condition takes this case outside the specific rules in paragraph 1-4.3a for determining constructive cost. Rather, the general rule of paragraph 1-4.3 that the claimant may recover the "total constructive cost of [the] *appropriate* common carrier transportation" controls. Since rail travel was the "appropriate" common carrier transportation under the circumstances, we conclude that Dr. Joseph should be reimbursed up to the constructive cost of first-class rail transportation. See FTR paragraph 1-4.3a(2).

The certifying officer next submits for decision the issue of whether Dr. Joseph's annual leave should be charged for the normal working hours he missed exceeding the hours that would have been required had the trip been completed by plane. By letter to the Veterans Administration, dated January 11, 1965, B-155693, we stated that although the determination to charge an employee leave because he travels by privately owned vehicle when he could have accomplished the official business involved in a shorter time had he traveled by appropriate common carrier is a matter primarily within the sound discretion of the head of the agency concerned, we believe that, in the interest of economy, employees who use privately owned vehicles for official travel, when such mode of travel is not to the advantage of the Government, should be charged leave for excess traveltime.

Additionally, we have held that where excess time away from official duties was occasioned by the employee's election to travel by privately owned vehicle as a matter of personal preference, the excess absence from work should be charged to annual leave. 56 Comp. Gen. 865 (1977).

Since we hold that Dr. Joseph should be reimbursed at the constructive cost of rail transportation, the agency must determine the constructive traveltime Dr. Joseph would have taken for the same trip by rail. Because Dr. Joseph traveled by car and made three stops along the way for personal reasons, his absence totaled 7 days. Accordingly, the normal work hours involved in the trip, in excess of those required for the same trip by rail transportation, may be charged to Dr. Joseph's annual leave.

[B-210916]

Statutory Construction—Prospective Effect of Acts

Section 145 of Pub. L. 97-377, Dec. 21, 1982, which amends 5 U.S.C. 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to Aug. 3, 1981, as were the original provisions of 5 U.S.C. 5546a(a) added by subsec. 151(a) of Pub. L. 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express language nor the legislative history supports the view that the amendment made by sec. 145 is retroactively effective.

Matter of: Federal Aviation Academy Instructors, May 20, 1983:

This is in response to a request for an advance decision by the Director of Personnel and Training of the Federal Aviation Administration, Department of Transportation, as to whether instructors at the Federal Aviation Academy in Oklahoma City, Oklahoma, are entitled to premium pay retroactive to August 3, 1981. The question arises in view of the premium pay provisions (5 U.S.C. § 5546a) added by section 151 of Public Law 97-276, October 2, 1982, 96 Stat. 1186, 1200, as amended by section 145 of Public Law 97-377, December 21, 1982, 96 Stat. 1830, 1917. As explained below, we find that the effective date of the instructors' entitlement to the premium pay involved is not earlier than December 21, 1982, the date of passage of the amendment which included Federal Aviation Academy instructors under the coverage of the premium pay provision set forth at 5 U.S.C. § 5546a(a). The statutory language does not provide that the instructors' entitlement to premium pay under 5 U.S.C. § 5546a(a) was to be retroactively effective nor does the legislative history clearly indicate that such entitlement was meant to be retroactive.

Subsection 151(c) of Public Law 97276* amended Chapter 55 of title 5, United States Code, by adding the following provision for premium pay for certain employees of the Federal Aviation Administration:

§ 5546a. Differential pay for certain employees of the Federal Aviation Administration.

(a) The Administrator of the Federal Aviation Administration (hereafter in this section referred to as the "Administrator") may pay premium pay at the rate of 5 per centum of the applicable rate of basic pay to—

(1) any employee of the Federal Aviation Administration who is—

(A) occupying a position in the air traffic controller series classified not lower than GS-9 and located in an air traffic control center or terminal or in a flight service station;

(B) assigned to a position classified not lower than GS-9 or WG-10 located in an airway facilities sector; or

(C) Assigned to a flight inspection crew-member position classified not lower than GS-11 located in a flight inspection field office, the duties of whose position are de-

*The provision in Public Law 97-276, Containing Appropriations for Fiscal Year 1983, relating the compensation of certain employees of the Federal Aviation Administration is erroneously set out as Section 151 rather than Section 152. Section 151 follows another Section 151 which pertains to appropriations to the National Endowment for the Humanities. The express language of several subsections of Section 151 as well as its legislative history clearly show that such section was intended to be enacted as Section 152 of Public Law 97-276.

termined by the Administrator to be directly involved in or responsible for the operation and maintenance of the air traffic control system; and

(2) any employee of the Federal Aviation Administration who is assigned to a flight test pilot position classified not lower than GS-12 located in a region or center, the duties of whose position are determined by the Administrator to be unusually taxing, physically or mentally, and to be critical to the advancement of aviation safety.

(b) The premium pay payable under any subsection of this section is in addition to basic pay and to premium pay payable under any other subsection of this section and any other provision of this subchapter.

With regard to the effective date of 5 U.S.C. § 5546a, added by subsection 151(c), subsection 151(h)(1) of Public Law 97-276 provided as follows:

(h)(1) The amendments made by subsections 152 (b), (c), (e), and (g) of this joint resolution shall take effect at 5 o'clock ante meridian eastern daylight time, August 3, 1981.

Thus, the employees covered by 5 U.S.C. § 5546a(a) as added by subsection 151(c) of Public Law 97-276 are entitled to the payment of premium pay thereunder retroactive to August 3, 1981. However, at the time it was first enacted, section 5546a(a) did not include employees occupying positions as instructors at the Federal Aviation Administration Academy.

The legislative history of section 151 shows that it was enacted in part to fulfill for the air traffic controllers who continued to work after the strike against the Federal Government on August 3, 1981, the administrator's prior commitment to propose legislation to increase controller benefits. See S. Rept. No. 97-581, 97th Cong. 2d Sess. 20-21.

Section 145 of Public Law 97-377, December 21, 1982, Continuing Appropriations for Fiscal Year 1983, amended 5 U.S.C. § 5546a(a) to include premium pay for Academy instructors by adding immediately after paragraph (2) the following:

(3) any employee of the Federal Aviation Administration who occupies a position at the Federal Aviation Administration Academy, Oklahoma City, Oklahoma, the duties of which are determined by the Administrator to require the individual to be actively engaged in or directly responsible for training employees to perform the duties of a position described in * * * paragraph (1) of this subsection, and who, immediately prior to assuming such position at such Academy occupied a position referred to in * * * paragraph (1) of this subsection.

Thus, under 5 U.S.C. § 5546a(a) as amended by section 145 of Public Law 97-377, an instructor at the Federal Aviation Administration Academy in Oklahoma City is entitled to premium pay provided that he meets the conditions set forth therein.

The Federal Aviation Administration has advised us in its submission that its analysis is that the entitlement to premium pay for Academy instructors added by section 145 of Public Law 97-377 is not retroactive but only operates prospectively from the date of enactment of Public Law 97-377. That is because the provision for retroactive application contained in subsection 151(h)(1) of Public Law 97-276 only applied to amendments made by subsections 151 (b), (c), (e), and (g) of Public Law 97-276.

The general rule is that an amendatory statute will be applied prospectively and not retroactively unless a retroactive construction is required by express language or by necessary implication. 16 Comp. Gen. 1051 (1937), 26 *id.* 592 (1947), and 29 *id.* 11 (1949).

There is nothing in the language of either section 145 or any other section of Public Law 97-377 which provides that the amendment made by section 145 is to be effective on a retroactive basis. Neither is there any language in 5 U.S.C. § 5546a(a) as added by section 151 of Public Law 97-276 which would indicate that subsequent amendments thereto are to be retroactively effective. In addition, an examination of the legislative history of section 145 does not establish the existence of a legislative intent that the amendment made by section 145 was to be retroactively effective on the same basis as 5 U.S.C. § 5546a(a) as added by subsection 151(c) of Public Law 97-276. The statement of the Conference Committee on the amendment which was enacted as section 145 shows that the purpose of the section was to correct the inequity to instructors at the Academy which occurred because they were not entitled to premium pay. However, we found nothing there that would indicate that the entitlement of instructors to premium pay under 5 U.S.C. § 5546a(a) was to be retroactively effective. The report indicates that the amendment was in part intended to resolve possible difficulties in the future recruitment of instructors for the Academy. It states in part:

> The conferees have agreed to this provision in order to correct an inequity which arose upon the enactment of legislation to increase the compensation of air traffic controllers and related personnel in October. Under that legislation, instructors at the FAA Academy in Oklahoma City who train individuals to perform air traffic control, airway facilities, and flight inspection functions which would qualify for premium pay, would not themselves be entitled to premium pay. This section permits these instructors and their immediate supervisors to receive this premium pay.
>
> Without this expansion of coverage, recruitment of instructors for the Academy could be hampered, because people in operational positions covered by premium pay would not want to accept a position at the Academy which would require giving up those benefits. The new provision requires that, in order to be eligible for premium pay, a person must have occupied a position in the field which would have been covered by premium pay immediately prior to accepting a position as an instructor in the Academy.
>
> The conferees expect the Administrator to make the necessary coverage determinations as soon as practicable in order that these pay raises may become available as soon as possible.

H.R. Rep. No. 97-980, 97th Cong. 2d Sess. 197 (1982).

The remaining legislative history of section 145 consists of statements on the floor of the Senate by Senator Boren, the sponsor of the unprinted amendment number 1490 which, as amended, was enacted as section 145 of Public Law 97-377, and by Senator Andrews (the Chairman of the Subcommittee on Transportation, Senate Committee on Appropriations). See 128 Cong. Rec. 15098 (daily ed., December 16, 1982). In part, Senator Andrews stated that he shared Senator Boren's concern that all those Federal Aviation Administration employees who contributed to the strike recovery

should be treated fairly and equally and concluded in his remarks as follows:

> * * * It is an amendment that simply extends to those air traffic controllers, who were temporarily assigned as instructors at the Air Controller Training Academy the same bonus benefits and salary as received by the other air traffic controllers who stayed on the job during the recent emergencies, to make sure all these air traffic controllers who stayed on the job are treated alike.

We are unable to view the above remarks on the intended equality of the treatment of Academy instructors as sufficient to demonstrate a legislative intent that the amendment made by section 145 of Public Law 97-377 would operate to provide entitlement of premium pay on a retroactive as well as a prospective basis. In the absence of express language or a clear implication in the statute that section 145 was to be retroactively effective, we must agree with the Federal Aviation Administration that the Academy instructors' entitlement to premium pay under 5 U.S.C. § 5546a(a) is prospective only, from the date of enactment of Public Law 97-377, December 21, 1982.

[B-204409]

Courts—Judgments, Decrees, etc.—*Res Judicata*—Subsequent Claims

An employee seeks a Comptroller General decision on his entitlement to salary retention. The General Accounting Office (GAO) adheres to the doctrine of *res judicata* to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the GAO. 47 Comp. Gen. 573. Since in *William C. Ragland* v. *Internal Revenue Service*, Appeal No. 55-81 (C.A.F.C. November 1, 1982), it was previously decided that the employee was not entitled to saved pay benefits, the GAO will not consider his claim for salary retention.

Matter of: William C. Ragland—Claim For Salary Retention—Res Judicata, May 23, 1983:

Mr. William C. Ragland seeks a Comptroller General decision on his entitlement to salary retention. The United States Court of Appeals for the Federal Circuit specifically decided in this same matter that he was not entitled to saved pay benefits. *William C. Ragland* v. *Internal Revenue Service*, Appeal No. 55-81 (C.A.F.C. November 1, 1982). The issue is whether the General Accounting Office will consider his claim in light of the previous judgment of the United States Court of Appeals for the Federal Circuit denying it. We conclude that his claim will not be considered, because it is barred by our application of the doctrine of *res judicata*.

Mr. Ragland was an employee of the Internal Revenue Service in Washington, D.C. When his position was eliminated, he was reassigned to a position at the same grade in Houston, Texas. He believed this position to be a "sham," which would be abolished after he relocated. Prior to his reporting for duty in Houston, he accepted a lower-graded position with another unit of the Internal Reve-

nue Service in Washington, D.C. He signed a statement indicating that he voluntarily accepted the lower-graded position.

Under 5 U.S.C. §§ 5362 and 5363 (Supp. IV 1980), and the implementing regulations at 5 C.F.R. Part 536 (1983), certain Federal employees who have been subject to reductions in grade as a result of grade reclassification actions or reduction-in-force actions, acquire certain entitlements to grade and pay retention. However, a Federal employee who is reduced in grade or pay at his own request acquires no such entitlements. 5 U.S.C. §§ 5362(d)(2) and 5363(c)(3); and 5 C.F.R. § 536.105(a)(3). If Mr. Ragland voluntarily accepted the lower-graded position, he would have no entitlement to grade or pay retention.

The Internal Revenue Service denied Mr. Ragland grade and pay retention, since it viewed Mr. Ragland's reduction-in-grade as having been at his own request. Mr. Ragland—because he views the reassignment to the Houston position as a "sham"—has contended that his acceptance of the lower-graded position was his only option. He has argued that his acceptance of the lower-graded position was not voluntary; therefore, qualifying him for grade and pay retention.

On November 20, 1980, Mr. Ragland filed a claim for salary retention in this matter with our Claims Group. Previously, the Merit Systems Protection Board dismissed an action brought before it in this same matter by Mr. Ragland. *William C. Ragland* v. *Internal Revenue Service,* MSPB Decision No. DC075209252 (September 30, 1980). The Merit Systems Protection Board later denied his petition for review of this matter. *William C. Ragland* v. *Internal Revenue Service,* MSPB Decision No. DC075209252 (June 11, 1981). Our Claims Group denied Mr. Ragland's claim, by Certificate of Settlement Z-2827974, dated December 15, 1981, because it found that he had been placed in the lower-grade position as a result of his personal request. On January 30, 1982, Mr. Ragland appealed our Claims Group's decision. However, subsequently, we discovered that he had proceeded to active litigation with this same matter before the United States Court of Claims (later the United States Court of Appeals for the Federal Circuit) appealing the earlier Merit Systems Protection Board's decisions dismissing his action.

It is one of our Office's longstanding rules that we will not act on matters which are in the courts during pendency of litigation because the eventual outcome of the litigation may resolve the matter. See *Morris Mechanical Enterprises, Inc.,* B-200552, March 16, 1982. Since Mr. Ragland had elected to proceed to active litigation in court, we discontinued consideration of his appeal of our Claims Group's certificate of settlement.

Mr. Ragland lost in his litigation of this matter before the United States Court of Appeals for the Federal Circuit. *William C. Ragland* v. *Internal Revenue Service,* previously cited. Having lost in one forum, he desires to try another. He requests that his claim before us be renewed, "[s]ince the Merit Systems Protection Board did not rule on the question of salary retention * * *"

The General Accounting Office adheres to the doctrine of *res judicata* to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the General Accounting Office. 47 Comp. Gen. 573 (1968); *Ronald H. Whelan,* B-198763, June 25, 1980. We note that regardless of whether the Merit Systems Protection Board ruled on Mr. Ragland's entitlement to salary retention, the United States Court of Appeals for the Federal Circuit did. In this same matter—involving the same events, parties, issue, and argument—the United States Court of Appeals for the Federal Circuit decided that Mr. Ragland "* * * is not entitled to saved grade and pay benefits." *William C. Ragland* v. *Internal Revenue Service,* previously cited, at 3.

Therefore, since Mr. Ragland's claim has been considered and dismissed in court, the General Accounting Office will not consider his claim for salary retention.

[B-206706]

Officers and Employees—Transfers—Temporary Quarters—Subsistence Expenses—Computation of Allowable Amount

A transferred employee reclaims $25 per day for temporary quarters while residing with friends at new duty station. Agency disallowed amount claimed as unreasonable in view of lack of documentation to substantiate basis for the $25 or to establish that host family did incur extra expenses. Under Federal Travel Regs. para. 2-5.4c, agency provided a formula under which maximum reimbursement was $375 for 10-day period in question. Since employee has been reimbursed $343.22 for meal subsistence expenses, maximum available for lodging is $31.78 for 10-day period. Therefore, agency requirement for substantiation of $25 per day does not appear to be germane. Employee need only support lodging expense of friends for $31.78 for 10-day period. We find amount reasonable based upon use of host's utilities, cleaning services and linens.

Matter of: Gene R. Powers—Temporary Quarters Subsistence Expenses, May 23, 1983:

This decision results from the submission by the Chief, Disbursements Section, Bureau of Indian Affairs (Bureau), Department of the Interior of the reclaim voucher of Gene R. Powers, an employee of the Bureau, for temporary quarters expenses which were deducted from his original voucher on the basis that he had not furnished adequate substantiation that a friend, in whose home he had lodged, had incurred additional expenses as claimed. Under the analysis which follows we determine that the agency did not properly consider the effective amount of the claim remaining after meal and miscellaneous expenses were paid, and we hold that Mr. Powers is entitled to additional temporary quarters subsistence expenses (TQSE) reimbursement.

Incident to a transfer from Portland, Oregon, to Washington, D.C., Mr. Powers and his wife occupied temporary quarters in the home of friends in Great Falls, Virginia, a suburb of Washington, D.C., from February 29 through March 11, 1980. Mr. Powers' reclaim voucher only concerns the first 10-day period during which his subsistence expenses were itemized. His TQSE totaled $593.22 of which $343.22 was approved for payment and the balance of

$250, which represented the total lodging expense for the period claimed by Mr. Powers, was denied. Mr. Powers submitted a receipt which showed that the $250 claimed represented $25 per day which he paid to friends for the use of their home as temporary quarters for himself and his wife. The agency denied the temporary quarters expenses as it was dissatisfied that the cost information submitted by Mr. Powers was reasonable or that it could adequately verify that Mr. Powers' friends did in fact incur additional expenses as a result of Mr. Powers' stay. The agency also referenced our decision published in 52 Comp. Gen. 78 (1972).

Responding to the Bureau's request that he supply documentation to substantiate the reasonableness of his temporary quarters payments to his friends, Mr. Powers submitted a letter he obtained from a motel located in the vicinity of his friends' house which showed that the daily motel rates were approximately double the amounts which he was claiming. Upon being informed by the Bureau that this was not considered relevant, he submitted the following breakdown of the daily per person expenses upon which the payment of $25 was predicated: electricity—$2; natural gas—$1.50; water—$1; laundry—$1; linens & towels—$1.50; telephone $0.50; cleaning of room—$5 which totaled $12.50 times 2 persons for a daily rate of $25. The Bureau found the above cost itemization to be unreasonable, and therefore deducted the total lodging expenses from Mr. Powers' voucher, and reimbursed him for all other subsistence expenses as claimed.

Pursuant to 5 U.S.C. § 5724a (1976), paragraph 2-5.4 of the Federal Travel Regulations (FTR), FPMR 101-7, May 1973, authorizes, under proper circumstances, the payment of subsistence expenses of an employee and his immediate family while occupying temporary quarters when the employee is transferred to a new official station. This regulation requires reimbursement only for actual subsistence expenses incurred, provided they are reasonable as to amount.

The amount which may be reimbursed for temporary quarters subsistence expenses is set forth in FTR paragraph 2-5.4(c) which provides that reimbursement shall be the lesser of either the actual amount of allowable expenses incurred for each 10-day period or a daily rate not in excess of 75 percent of the maximum statutory per diem for the employee and two-thirds of that rate for each family member. Based upon a maximum per diem rate of $30 then established by the Department of the Interior for change of station travel and temporary quarters, Mr. Powers' reimbursement could not exceed $22.50 for himself and $15 for his wife or $37.50 per day. Therefore, for the first 10-day period, $375 is the maximum payable of which $343.22 has been paid as indicated above, leaving only $31.78 as the maximum payment which may be authorized for temporary quarters reimbursement for this 10-day period. (The 11th and 12th days are not at issue since only $25 for each of those days

is reimbursable for TQSE under FTR paragraph 2-5.4(c). Since Mr. Powers' actual expenses, excluding lodging, exceeded $25 for each of these days, he has been reimbursed the maximum daily rate of $25.)

While reimbursement for charges for lodging and related services supplied by friends or relatives may be allowable, we have consistently held that what is reasonable depends upon the circumstances of each case. *Richard E. Nunn,* 58 Comp. Gen. 177 (1978). In determining what is reasonable, factors such as an increase in the use of utilities, hiring of extra help, and extra costs incurred by the relative or friend are to be taken into consideration. The onus is on the claimant to provide sufficient information to enable the employing agency to determine the reasonableness of his claim, and it is not enough to show that the amount is less than the commercial rate or the maximum rate allowable under the regulations. *James W. Clark,* B-193331, April 25, 1979, and cases cited therein. We have stated that it is the responsibility of the employing agency, in the first instance, to insure that expenses are reasonable. *Jesse A. Burks,* 55 Comp. Gen. 1107 (1976). However, even though the determination of what is reasonable is primarily the responsibility of the employing agency, the agency may not make such a determination arbitrarily and without adequate information to justify the amount arrived at. *Gordon S. Lind,* B-182135, November 7, 1974; *Michael J. Scullin,* B-187822, June 1, 1977.

As indicated above, the agency without explanation determined Mr. Powers' claim of $25 per day or $250 for the relevant 10-day period for lodging of himself and his wife to be unreasonable. However, since Mr. Powers' maximum additional entitlement for temporary quarters for the entire 10-day period is limited to $31.78 per FTR paragraph 2-5.4c as explained above, it is apparent that the agency's consideration of the $250 claimed to be unreasonable does not focus on the relevant amount still subject to payment. Rather the agency should have considered the reasonableness only of the maximum amount reimbursable under applicable regulation, $31.78, rather than the amount claimed ($250) before consideration of the approved meal and miscellaneous expenses.

The record in the instant case lacks a proper basis to support an agency determination that the amount of $31.78 for lodging for the 10-day period was unreasonable under the circumstances. To the contrary, we believe that the inherent inconvenience experienced by Mr. Powers' friends, the increase in labor required, including room cleaning and supply of linens furnished, and the increased cost of utilities justify a conclusion that a total amount of $31.78 for the entire 10-day period was reasonable in the absence of evidence to the contrary.

Accordingly, Mr. Powers' reclaim voucher should be paid in accordance with the guidance outlined above.

[B-200108]

Courts—Magistrates—Authority—Withdrawal From Court Registry Funds

Upon consent of all the parties, a magistrate may be specially designated to make final determinations of the district court in all civil matters. 28 U.S.C. 636(c), as amended in 1979. Therefore, in those cases a magistrate may also be legally authorized to order withdrawal of money from the court registry.

Matter of: Magistrates' Authority to Order Withdrawals from Court Registry Funds, May 24, 1983:

The General Counsel of the Administrative Office of the Courts has asked whether a United States District Court Judge may delegate to U.S. magistrates the authority to order withdrawals of moneys deposited into the court registry.

Pursuant to 28 U.S.C. § 2042 (1976), an order of the court is required before withdrawal of money from the court registry. Mr. Carl Imlay, the General Counsel, for both legal and policy reasons, is of the opinion that the magistrate cannot be delegated the authority to make withdrawals from the court registry. At least in one particular class of cases, we disagree with the question of the legal authority.

The statute referred to above required until 1948 that a judge order withdrawal of the money. In that year the statute was revised, omitting any reference to judges with regard to the withdrawal of registry funds. The substitute language, contained in 28 U.S.C. § 2042, states in relevant part, "No money deposited shall be withdrawn except by order of the court." The legislative history of this change does not indicate an intention to alter the substantive requirements of this longstanding provision. For this and other reasons, the General Counsel concludes that a judge still has to order a withdrawal.

The General Counsel advises that magistrates are appointed for limited terms under the Federal Magistrates Act, 28 U.S.C. §§ 631 *et seq.* (1976 and Supp. V). He describes their jurisdiction as limited in nature and including:

> The conduct of initial proceedings in criminal cases, the trial of federal misdemeanor cases by consent of the defendant, the handling of certain pretrial matters by reference from the court, and the conduct of civil jury trials by consent of all parties.

We agree that when the magistrates were created to replace the system of U.S. commissioners, Congress intended to restrict severely their jurisdiction. However, in the Act of October 10, 1979, Pub. L. No. 96-82, 93 Stat. 643, § 2(2), which among other things added subsection 636(c) to title 28, Congress expressly expanded the magistrates' jurisdiction to permit, with the consent of the parties, magistrates to try any civil case and to have that case brought directly on appeal to a United States Court of Appeals. The relevant Senate report on the bill reads in pertinent part:

> The bill would permit magistrates, where specially designated by their district courts, to try any civil case upon the consent of the parties. * * * Magistrates presently have no explicit authorization to finally decide civil cases. The bill would

explicitly permit such jurisdiction and thus codify and replace the experimental practice now being carried on in a number of districts under 28 U.S.C. § 636(b)(2) and (b)(3). * * * Under the bill, an appeal of right lies from the final judgment of a magistrate to the court of appeals for the circuit in which the magistrate sits. * * * The magistrate is empowered to direct the entry of a final judgment of the district court and the appeal will be handled in the same manner and priority as if the district court had entered the final judgment directly. * * * The bill also provides an alternative method for taking appeals if the parties consent to the alternative method at the time the reference to the magistrate is made. In such cases, the appeal of right from the magistrate's decision will lie to the district court, in the same manner that an appeal is taken from a judgment of the District judge or in such other manner as the parties may stipulate. Senate Report No.74, 96th Cong., 1st Sess. 4-5 (1979).

Moreover, it does not seem to be consistent with the role of United States magistrates, set forth in the statute quoted above, to require a District judge to sign all orders requiring a return of collateral in a traffic case heard by a magistrate and dismissed, or the return of a cash bond in a misdemeanor trial when the magistrate found the defendant not guilty. Instead of relieving the District judge of some of his burden of litigation by permitting him to delegate certain cases to a magistrate, the District judge would be forced to review the magistrate's disposition of the case in order to support his order to withdraw funds from the registry to return them to the depositor.

Nowhere in subsection (c) does the Congress directly address the issue of the magistrates' legal authority to order withdrawals from the court registry. However, it seems clear that magistrates, in this limited class of cases, are intended to have the power to make a final disposition of these cases in lieu of the District court judge. For example, as one magistrate pointed out in a letter to the Administrative Office of the Courts:

It would appear to us that the power to order exoneration or forfeiture of bonds in criminal cases is clearly and necessarily broad enough to encompass the ordering of the return of funds a bondsman has paid into the registry of the court on a forfeiture of bond.

We think, therefore, that magistrates do have the legal authority to order withdrawals from the registry in cases they have decided for the District court. This is buttressed, although indirectly, by section 636(b) which provides: "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States."

Accordingly, it would appear that magistrates have the legal authority to order withdrawals of funds from the court registry, at least in cases for which, by consent of the parties, they have the authority to enter the judgment of the District court.

The General Counsel of the Administrative Office also expresses policy reasons for denying this authority to magistrates. For example, he states that "potentially serious practical problems * * * could arise from a proliferation" of those who can order withdrawals. Those problems are not specifically identified, but in any event, they are primarily for the Administrative to resolve.

Allowing the magistrates to order withdrawals does not violate, as the General Counsel indicates it might, any of our decisions. Our

decisions which the General Counsel cites are intended to preclude accountable officers with actual physical custody of money from having to compromise the security of the funds entrusted to their care by sharing the facilities given to the employee to safeguard the money. They are therefore not applicable to magistrates who do not have physical custody of any funds.

[B-198634]

Military Personnel—Record Correction—General Accounting Office Jurisdiction

Corrections of military records made pursuant to actions by boards for correction of military records under 10 U.S.C. 1552 are final and conclusive on all officers of the United States, except when procured of fraud. Thus, the Comptroller General does not have jurisdiction to review correction board actions in individual cases but must apply the pertinent laws and regulations to the facts as shown by the corrected records to determine the amounts payable as a result of the corrections.

Pay—Retired—Computation—Alternate Method—Public Law 94-106 Effect

An Army officer, after completing over 30 years of active service, who could have retired with retired pay unconditionally resigned from the military in 1961. Subsequently, the Army Board for Correction of Military Records corrected the officer's record to show that he retired in Feb. 1982. His situation falls within the provisions of 10 U.S.C. 1401a(f) for the computation of his retired pay since he initially retired in 1982 and initially became entitled to retired pay at that time. However, under that section the 1972 basic pay rates (which would be most advantageous to him) in computing his retired pay may not be used because he was not a member of the Army in 1972. Thus, he could not have retired then and had no grade or basic pay rate for use in computing retired pay.

Matter of: Major General Edwin A. Walker, AUS (Retired), May 25, 1983:

Background

This action is in response to a request from a disbursing officer of the Army Finance and Accounting Center for an advance decision concerning the application of 10 U.S.C. § 1401a(f) (1976) in computing the retired pay of Major General Edwin A. Walker, AUS, Retired. The request was forwarded here by the Office of the Comptroller of the Army under Control Number DO-A-1416, allocated by the Department of Defense Military Pay and Allowance Committee.

We also have been advised by Department of Justice representatives that the case of *Edwin A. Walker* v. *United States,* No. 169-80C (Ct. Cl. filed April 10, 1980), involving General Walker's retired pay, currently being litigated in the United States Claims Court, has been suspended pending our determination as to whether section 1401a(f) is applicable under the present circumstances.

In deciding this case we have given full consideration to arguments made on General Walker's behalf in a brief filed with us by his attorney, Joseph Dinsmore Murphy, Esq.

Facts

In 1961 General Walker, who was then a Regular Army officer, held the permanent grade of brigadier general and the temporary grade of major general. For personal reasons he submitted his unqualified resignation from the Army in October 1961, which was accepted, and he was discharged from his commission on November 4, 1961. Although he had completed over 30 years of active service at the time of his resignation and was eligible to request retirement under 10 U.S.C. § 3918, he specifically rejected retirement and receipt of retired pay at that time. Subsequently, in November 1973 General Walker applied to the Army for retired pay retroactive to 1961. The Army advised him that since he had resigned, not retired, he was not entitled to retired pay. However, his request was forwarded to the Army Board for Correction of Military Records to be treated as an application for a correction of his records to allow him the retired pay of a major general retroactive to 1961. The Board denied that application. However, after additional correspondence, the Board gave further consideration to the matter based on another application filed in August 1981. At that time, the Board deemed it inappropriate to make General Walker's retirement retroactive to 1961 because he had failed to take advantage of this option to retire at that time. However, the Board did recommend that his military records be changed to show that, under the authority contained in 10 U.S.C. § 597, he was appointed and accepted a warrant in the grade of chief warrant officer, W-4, in the United States Army Reserve on January 31, 1982, and that under the authority contained in 10 U.S.C. § 1293 and 10 U.S.C. § 3964, respectively, he was retired on February 1, 1982, and advanced on the retired list to the grade of major general, O-8. On June 21, 1982, the Assistant Secretary of the Army approved the recommendation of the Board and the recommended action was taken pursuant to 10 U.S.C. § 1552.

Questions Presented

We are asked the following questions concerning the computation of General Walker's retired pay: First, may General Walker's retired pay be computed using the provisions of 10 U.S.C. § 1401a(f)? If the answer to this question is affirmative, may the October 1972 basic pay rates be used in computing General Walker's retired pay since these rates would be of the greatest benefit to General Walker even though he had no military status in 1972? Alternatively, may the pay rates in effect in October 1961, just prior to his resignation but while he was on active duty, be used in computing General Walker's retired pay? We find that while General Walker's retirement falls within the provisions of section 1401a(f), that provision does not allow the use of the 1972 pay rates in computing his retired pay, and that using the 1961 pay rates would be

Questions Presented

of no benefit to him since the 1981 rates otherwise applicable result in more retired pay for him.

Discussion

Section 1552 of title 10, United States Code, authorizes corrections of military records, such as were made in General Walker's case, when considered necessary by the Secretary concerned to correct an error or remove an injustice. Such record corrections are "final and conclusive on all officers of the United States," except when procured by fraud. 10 U.S.C. § 1552(a). General Walker's attorney cites various irregularities which he perceives in the Correction Boards' proceedings in General Walker's case and argues that if the Board had acted properly, it would have corrected General Walker's record in 1973 to place him on the retired list at that time. However, unlike the Claims Court, which reviews Correction Board actions to determine whether they have been arbitrary, capricious, or not in accordance with law, we have no jurisdiction to perform such a review. Our role is to see that payments to be made as a result of a record correction under 10 U.S.C. § 1552 are made in the amounts determined due by applying the pertinent laws and regulations to the facts shown by the records as corrected. 34 Comp. Gen. 7 (1954); 38 *id.* 208 (1958). Therefore, in this case we must apply the pertinent statutes to the facts as shown in the corrected record, to determine General Walker's retired pay entitlement.

General Walker resigned in 1961 and had no military status from that time until January 31, 1982, when by correction of his records he was appointed as a warrant officer and the next day placed on the retired list. The Correction Board action did not change the fact that he had resigned and had not retired in 1961, nor did it restore his military status in 1973 or at any other time until 1982. Thus, he was on neither the active nor retired lists from November 1, 1961, until February 1, 1982.

Regular Army officers, such as General Walker was prior to his resignation, are entitled to retired pay only if they are "retired." 10 U.S.C §§ 3918, 3929, 3991. A retired Regular Army officer countinues to hold a military office, remains a member of the Regular Army, and in effect receives retired pay characterized as reduced compensation for reduced services. See 10 U.S.C. § 3075; *United States* v. *Tyler,* 105 U.S. 244 (1881); and *McCarty* v. *McCarty,* 453 U.S. 210, 222–224 (1981). A Regular officer's loss of his status as a military officer entails loss of entitlement to retired pay. *Hooper* v. *United States,* 164 Ct. Cl. 151 (1964); *Matter of Snyder,* 58 Comp. Gen. 566, 568 (1979); and *McCarty* v. *McCarty,* cited above. Since General Walker, by resigning in 1961, lost his military status at that time, there is no basis for us to authorize payment to him of retroactive retired pay for the period from the date of his resignation, or from any other date, until he was placed on the retired list on February 1, 1982, by the record correction action. General Walk-

er's entitlement to retired pay began effective February 1, 1982, and it is in regard to the computation of that pay which the questions concerning 10 U.S.C. § 1401a(f) relate.

Application of Section 1401a(f)

Since by the record correction action General Walker was retired effective February 1, 1982, under 10 U.S.C. § 1293, as a warrant officer, but on that same date was advanced on the retired list to major general under 10 U.S.C. § 3964, his retired pay is computed under 10 U.S.C. § 3992. Under section 3992 retired pay is computed by multiplying 2½ percent times the member's creditable years of service. The percentage thus derived is then applied to the monthly basic pay of the grade to which he was advanced, major general, O-8, to determine the amount of monthly retired pay.

However, there is also to be considered 10 U.S.C § 1401a which in general directs that military retired pay be adjusted to reflect adjustments in civil service annuities which are based on changes in the Consumer Price Index. Subsection 1401a(f) was added by section 806 of the Department of Defense Appropriation Authorization Act, 1976, Public Law 94-106, October 7, 1975, 89 Stat. 538-539, commonly referred to as the "Tower Amendment." That subsection provides:

(f) Notwithstanding any other provision of law, the monthly retired or retainer pay of a member or a former member of an armed force *who initially became entitled to that pay on or after January 1, 1971,* may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date, adjusted to reflect any applicable increases in such pay under this section. *In computing the amount of retired or retainer pay to which such a member would have been entitled on that earlier date, the computation shall,* subject to subsection (e) of this section, *be based on his grade, length of service, and the rate of basic pay applicable to him at that time.* [Italic supplied.]

Subsection 1401a(f) was adopted to alleviate the so-called "retired pay inversion" problem, which was created by the fact that for several years upward cost-of-living adjustments of retired and retainer pay under 10 U.S.C. § 1401a had occured in greater amounts and with greater frequency than increases in active duty military basic pay. The result of this was that many of those who remained on active duty after becoming eligible for retirement were losing considerable amounts of retired pay. Subsection 1401a(f) was intended to provide an alternate method of calculating retired pay. It essentially involves calculating the maximum amount of retired pay based not on the member's actual retirement but rather on his earlier eligibility for retirement. See the colloquy in the Senate at the time the provision was adopted, 121 Cong. Rec. 17581-17587 (1975); S. Rep. No. 94-385, 94th Cong., 1st Sess. 73 (1975); 59 Comp. Gen. 691 (1980); 56 *id.* 740 (1977).

We have long followed the rule that in construing a statute, words and phrases should be given their plain, ordinary and usual meaning unless a different purpose is clearly manifested in the

statute or its legislative history. *See* 46 Comp. Gen. 392 (1966). Section 1401a(f) clearly states that the retired or retainer pay of a member who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date.

Therefore, in answer to the first question, General Walker "initially became entitled" to retired pay when he was placed on the retired list on February 1, 1982. Although he had over 30 years of service in 1961 and therefore was eligible to retire at that time, he did not become *entitled* to retired pay then because he chose to resign rather than retire. Accordingly, General Walker's retirement situation falls within the first sentence of 10 U.S.C. § 1401a(f).

In answer to the second question as to whether the October 1972 basic pay rates may be used in computing General Walker's retired pay, since in 1972 he was not a member of the Army (he had resigned in 1961), he could not have retired in 1972. General Walker had no "grade" or "rate of basic pay" in 1972. Thus, the more advantageous 1972 pay rates may not be used in computing his retired pay under the provision of section 1401a(f), which specifically provides that in computing the amount of retired or retainer pay to which he would have been entitled on that earlier date, the computation shall be based on the "grade" and "basic pay rate" applicable to him at that time. *See, e.g.,* 56 Comp. Gen. 740 (1977).

For the same reasons we may not compute his retired pay on the basis of his eligibility for retirement in 1973, as his attorney argues. While General Walker requested that his records be corrected then, the Correction Board did not take the action requested, and under the corrected records, as is indicated above, he had no military status in 1973.

As to the last question concerning whether the 1961 pay rates may be used, in 1961 General Walker was on active duty, he had a grade and pay rate, and he had over 30 years of service. Therefore, at that time the literal language of section 1401a(f) was satisfied. However, we have been advised by the Army that the basic pay rates in effect in 1961 would be least advantageous to General Walker when compared with the 1972 rates and the October 1981 rates. Thus, the question concerning the 1961 rates need not be answered. Accordingly, the October 1981 rates should be used in computing his retired pay.

[B-205154.2]

General Accounting Office—Audits—Authority—Foreign Assistance Act Activities

Pursuant to the Budget and Accounting Act, 1921, as amended, 31 U.S.C. 712, 716(a) (formerly 31 U.S.C. 53(a)), and the Legislative Reorganization Act of 1970, as amended, 31 U.S.C. 716(b) (formerly 31 U.S.C. 1154(a)), the General Accounting Office (GAO) is authorized to conduct comprehensive audits of activities under sec. 607(a) of the Foreign Assistance Act, as amended, 22 U.S.C. 2357(a), where Federal agencies directly participate in carrying out international agreements, such as those of

the United States-Saudi Arabia Joint Commission on Economic Cooperation. Our audit authority extends to Joint Commission procurements and contracts even though the funding is wholly provided by Saudi Arabia.

Contracts—Protests—Authority To Consider—United States-Saudi Arabia Joint Commission On Economic Cooperation Procurements

The GAO is not authorized to settle and adjust the dollar account used to hold Saudi Arabian monies covering Joint Commission project costs, and thus, will not entertain bid protests of Joint Commission procurements where, as in all Joint Commission Projects except one, no United States funds are involved at any stage of the procurement. The holding in *Mandex, Inc.*, B-204415, Oct. 13, 1981 is affirmed. Foreign Military Sales procurements are distinguished.

To The Honorable Douglas Barnard, House of Representatives, May 31, 1983:

This further responds to letters of October 6 and 27, 1981, June 2, 1982 and October 26, 1982, from the late Benjamin S. Rosenthal concerning the General Accounting Office's authority to audit the procurements and contracts of projects carried out under the aegis of the United States-Saudi Arabia Joint Commission on Economic Cooperation (Joint Commission), and its corresponding right to obtain access to all records which, in GAO's judgment, are necessary to conduct the audit. He was also interested in our reconsideration of the Office's Holding in *Mandex, Inc.*, B-204415, October 13, 1981, in which we declined to consider a bid protest of a Joint Commission procurement. Finally, he asked a series of questions pertaining to the applicability of United States laws and regulations to Joint Commission contracts. We understand from your staff that the Subcommittee is still interested in our opinion on all these topics.

We conclude that GAO is authorized to audit Joint Commission activities, including its procurements and contracts, and therefore has a right of access to any books, documents, papers, or records necessary to perform the audit. On the other hand, we sustain our conclusion in *Mandex, supra,* that we are without authority to entertain bid protests of procurements supporting Joint Commission projects since the governing agreement between the United States and Saudi Arabia provides both for full funding of those projects of Saudi Arabia in advance of any commitment being made by the United States, and for holding the United States harmless against any and all claims arising from project work.

With regard to the remaining inquiry, we would point out that absent a contractual provision to the contrary, United States law generally would govern Joint Commission project contracts performed in the United States, but would not apply to contracts executed and performed in Saudi Arabia. It also appears from the contracts we have reviewed that various United States laws and regulations are specifically incorporated in the contracts. The detailed analysis of all the contracts is not yet complete and will be provided at a later time. This opinion will answer the questions about the extent of our audit and bid protest authority.

I. Background

Section 607(a) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2357(a), authorizes United States agencies, upon Presidential determination, to furnish services and commodities to friendly countries on an advance of funds or reimbursement basis. Pursuant thereto, in February 1975 the United States entered into a 5-year Technical Cooperation Agreement with Saudi Arabia,[1] TIAS 8072, to facilitate the furnishing of technical and advisory services. The Agreement was intended to implement the goals of the United States-Saudi Arabia Joint Commission on Economic Cooperation established by Joint Statement of the United States and Saudi Arabia on June 8, 1974. TIAS 7974. The Joint Commission is headed by the United States Secretary of the Treasury and the Saudi Arabian Minister of State for Finance and National Economy.

Pursuant to the Agreement, Federal agencies, with the Treasury Department acting as the administering agency, enter into project agreements with the respective Saudi Arabian ministries. These agreements involve Saudi Arabia paying Treasury and other Federal agencies substantial sums of money for the services provided by the agencies; predominantly the services of agency employees.[2] Thus far, twenty-three project agreements have been concluded; eighteen projects currently are under way.

The Agreement intends that Saudi Arabia provide all the funding for the projects. Thus, section 5(a) calls for Saudi Arabia to establish in the United States Treasury a dollar account into which it advances the full amount of funds necessary to cover Joint Commission project costs; subsection (d) states that the United States shall not be obligated to provide services for which funds are not available in the trust account; and by section 9(a) Saudi Arabia agrees to hold the United States harmless against any and all claims arising from the services furnished under the Agreement.

The United States agencies providing services to the particular Joint Commission projects, including the services of agency employees, determine whether they are to be reimbursed or advanced funds from the account for a particular project, depending on their budget and fiscal procedures. When funds are advanced to an agency, they are credited to the appropriation accounts used to cover project expenditures; when they are reimbursed, they replenish agency appropriations already expended on a project. To our knowledge, with one exception, all Joint Commission projects were fully funded by Saudi monies in the dollar account. The exception, the Soleras project, is equally funded by the Department of Energy and the Saudi Arabian National Center for Science and Technology.

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[1] The agreement has been extended for an additional 5 years.

[2] In GAO/ID 83-4, at 7, 14, October 21, 1982, we stated that as of June 30, 1982, there were 290 Federal employees working full time on Joint Commission projects (226 in Saudi Arabia and 64 in the United States). As of December 31, 1981 total expenditures for Commission projects were about $507 million. (This includes $23 million of United States monies on the Soleras project discussed later in the text.) Payments to Federal agencies constitute a small part of the $507 million.

Although there is some variation in how Joint Commission procurements are undertaken, depending on the size of the procurement and the agency involved, as we understand it, mostly they are conducted either by the Treasury Department itself or by another implementing United States agency, with Saudi Arabia providing final approval of most planned procurements over $10,000. Treasury procurements, and most procurements of other Federal agencies, are conducted in accordance with the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 471 *et seq.*, and the policies and Federal procurement regulations prescribed thereunder, to the maximum extent practicable. *See* TD 70-06.G, May 17, 1982. Treasury informs us that occasionally procurements are undertaken directly by Saudi Arabia. These procurements also are funded through the dollar account.

II. Legal Discussion

A. Audit Authority and Access to Records

In its comments to us, Treasury argues that our decision in *Mandex, Inc.*, B-204415, October 13, 1981, in which we declined to consider a bid protest involving a Joint Commission procurement because the funds involved were not appropriated funds, was correct, both from a legal and policy standpoint. Treasury concludes that we have neither bid protest nor audit authority over funds deposited in the dollar account, described above. It therefore determined that it was inappropriate to grant GAO access to its files for the purpose of conducting a formal audit of procurements undertaken on behalf of the Joint Commission or to process bid protests filed by individual bidders. On the other hand, Treasury states that it recognizes GAO's general authority to review and evaluate Government programs and that it will cooperate with this process in every way possible within the law.

Treasury's position with regard to our audit authority appears to be based on two erroneous assumptions: (1) our audit and bid protest authorities are equally extensive, and since we do not have authority to entertain bid protests of Joint Commission procurements, it follows that we are unauthorized to formally audit them; and (2) a program audit of Joint Commission activities, pursuant to 31 U.S.C. § 717(b) (formerly 31 U.S.C. § 1154(a)) and the corresponding right of access to records supporting such an audit is less extensive than and would not include a formal audit of Joint Commission procurements and contracts.

The General Accounting Office is a principal means by which the Congress conducts oversight of executive branch programs and expenditures. The Congress relies on the GAO to insure that "(1) funds are used for their intended purposes, (2) agency resources are managed effectively and economically, and (3) programs are achieving the objectives set forth by law." S. Rep. No. 570, 96th Cong., 1st Sess. 1 (1980) (hereinafter referred to as S. Rep.). Over the years, as a result of the complex economic, social, political and military

issues facing the Congress, to a great extent, GAO has refocused its attention and responsibilities from traditional finance and accounting activities to assessments of the economy, efficiency and effectiveness of agency and program management and operation. *Id.* at 2.

The authority and responsibility of the GAO for making audits and conducting investigations of Government agencies and activities are stated in a number of laws. The Budget and Accounting Act, 1921, as amended, authorizes the Comptroller General to "investigate all matters related to the *receipt,* disbursement, and use of public money." [Italic supplied.] 31 U.S.C. § 712 (formerly 31 U.S.C. § 53(a)). The Senate Report accompanying the General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311, has characterized this authority as extending not only to accounting and financial auditing but also to administration, operations, and program evaluation. S. Rep. at 2. The Act also provides, as currently codified in 31 U.S.C. § 716(a) (formerly 31 U.S.C. § 54(a)) that "[e]ach agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency * * *."

Section 204(a) of the Legislative Reorganization Act of 1970, as amended, 31 U.S.C. § 717(b), provides that the "Comptroller General shall evaluate the results of a Government program or activity the Government carries out under existing law * * *." The legislative history shows that the section was intended to confer new authority on the GAO. Thus, the accompanying House Report stated: "[P]rogram review in the case of GAO * * * [is a] reasonable [extension] of the work [it] presently performs. The bill * * * assigns to the Comptroller General new statutory authority to review and analyze the results of Government programs and activities." H.R. Rep. No. 1215, 91st Cong., 2nd Sess. 18 (1970). Although the Senate Bill, S. 844, did not have the same provision, the Senate Report also indicated that the Act was intended to expand GAO's functions. In this regard, it said: "S. 844 would (1) enlarge the scope and functions of the General Accounting Office to enable it to supply a variety of budgetary and fiscal data to the Congress * * *." S. Rep. No. 202, 91st Cong., 1st Sess. 11 (1969). Nothing in the Act itself or the Committee reports suggests that the new authority was dependent on our authority to settle and adjust the accounts of Federal agencies and departments, the basis for our previous audit authorities.

Recognition that the Act provided new authority is shown explicitly in the GAO General Policy Manual, and, by inference, in the GAO Policy and Procedures Manual. The former states that the Act substantially expanded GAO's audit responsibility, General Policy Manual 1-5 (Oct. 1981), and the latter describes our audit authority, as extending, within certain limitations, to all activities, financial transactions, and accounts of the Federal Government, General Accounting Office Policy and Procedures Manual, Title I, § 7.2.

In view of the above, we think that our audit authority is considerably broader than our authority to settle and adjust the accounts of Federal agencies. (See later discussion about the basis for our bid protest authority.) Although most agency activities are supported by appropriated funds, we think our audit authority extends to activities of Federal agencies, such as those authorized by section 607(a) of the Foreign Assistance Act, where agencies are direct participants in international agreements, including activities wholly supported by foreign government monies. This is so even though the account used to hold the foreign government's funds until needed, such as the Saudi dollar account, is not subject to our settlement authority.

Based on the above, we conclude that our audit authority covers Joint Commission activities. As described in detail in the background section, those activities involve Saudi Arabia paying Treasury and other Federal agencies, pursuant to international agreements, substantial sums of money for the services provided by the agencies, predominantly the services of agency employees. Federal agencies conduct most Joint Commission procurements, to the maximum extent practicable in compliance with United States laws and Federal procurement regulations. Joint Commission projects and procurements, and Joint Commission arrangements also serve particular interest of the United States in addition to the general foreign policy interests described in subchapter 1 of the Foreign Assistance Act, 22 U.S.C. §§ 2151 *et seq.* At least three project agreements provide the United States with some form of patent rights to inventions arising from project work. The Comptroller General's review and audit authority thus clearly extends to these activities which are carried out directly by the Federal agencies and which also involve other rights and interests of the United States.

We also think that Treasury's suggestion that our "program" audit authority is somehow less encompassing than our "normal" audit authority is based on a misconception. Our authority to review the execution of Government programs is merely one aspect of our comprehensive audit authority. Our authority extends both to accounting and financial auditing as well as administration, operations, and program evaluation. Although we may choose to limit an audit to, or, to emphasize, program evaluation and operations instead of accounting and financial auditing in particular cases, this is not due to a lack of authority but rather to internal considerations about how the audit in question should proceed.

Section 313(a) of the Budget and Accounting Act, 1921, as amended, 31 U.S.C. § 716(a) (formerly 31 U.S.C. § 54(a)), authorizes the Comptroller General to inspect agency records to get any information he considers necessary to audit the "duties, powers, activities, organization, and financial transactions of the agency."[3] The

[3] The legislative history of the Act revising, codifying and enacting title 31 shows that the word "records" was substituted for "books, documents, papers, or records," the working in 31 U.S.C. § 54(a), and the word "record" includes "all terms previously used for records, documents, accounts, reports, files, memoranda, papers, things, and other similar items." H.R. Rep. No. 651, 97th Cong., 2nd Sess. 3, 31 (1982).

Senate Report accompanying the General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311, states that Congress recognized that GAO would require complete access to Federal agency records. S. Rep. at 5. Accordingly, since we have authority to audit Joint Commission activities, including its procurements and contracts,[4] it follows that we have a corresponding right of access to any and all agency books, documents, papers and records necessary to conduct that audit.

B. Bid Protest Authority

Although we have concluded that GAO is authorized to audit Joint Commission procurements and contracts, we agree with Treasury that, with a few exceptions, we do not have authority to entertain bid protests of its procurements. Thus, we affirm our holding in *Mandex, Inc., supra.*

GAO's bid protest jurisdiction, unlike its audit responsibilities, is based on its authority to settle and adjust accounts of Federal agencies, and to certify balances in the accounts of accountable officers under sections 304 and 305 of the Budget and Accounting Act, 1921, as amended, 31 U.S.C. § 3526 (formerly 31 U.S.C. §§ 71, 74); 4 C.F.R. §21.1. B-194663, May 10, 1979; *Cubic Western Data,* B-198530, May 15, 1980, 80-1 CPD ¶ 341. Our settlement authority extends both to accounts of Federal agencies supporting expenditures of appropriated funds and to the receipt of funds allocable to accounts of those agencies. *Peace Surplus,* B-186410, January 27, 1977, 77-1 CPD ¶ 64; *Seidman & Seidman,* B-186384, May 10, 1976, 76-1 CPD ¶306; *The Clip Joint,* B-184996, December 1, 1975, 75-2 CPD ¶ 367.

Pursuant to the terms of the Technical Cooperation Agreement, discussed *supra,* Saudi Arabia is obligated to cover all Joint Commission project costs, and must deposit funds necessary to meet the maximum United States obligations in a dollar account in the Treasury before any procurements on Saudi Arabia's behalf are commenced. In addition, Saudi Arabia must agree to hold the United States harmless from any and all claims that may arise as a result of the technical services furnished under the Agreement to the extent that the amounts involved exceed the Saudi Arabian funds in the deposit account. Since all the monies involved in these procurements are furnished by Saudi Arabia in advance and do not involve any expenditures of appropriated funds (with the exception of the Department of Energy funds for the Soleras project, discussed later), we have no authority to take exceptions to any expenditures made with those funds. Accordingly, our bid protest jurisdiction would not extend to procurements supported by Saudi funds deposited pursuant to the Technical Cooperation Agreement.

[4] Consistent with section 304 of the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 254(c), it appears that Joint Commission contracts entered into by the United States have a standard clause giving the Comptroller General access to a contractor's and subcontractor's books, documents, papers, and records involving transactions related to the contract or subcontract until 3 years after expiration of final payment.

Although we asserted our bid protest jurisdiction over foreign military sales procurements in 58 Comp. Gen. 81 (1978), which, at first glance, appear quite similar to those undertaken by Federal agencies for Joint Commission projects, there are important differences which merit some discussion. (In its report to us about the Joint Commission procurements, the Department of the Treasury states its view that our decision about foreign military sales was erroneous and should be reversed.)

Foreign military sales are conducted under authority of the Arms Export Control Act, as amended, 22 U.S.C. §§ 2751 *et seq.* There are three principal authorities for funding the procurements made for foreign governments under this Act.

Section 2762(a) (cash sales) allows the United States to enter into procurements upon receipt of a "dependable undertaking" on the part of the foreign government to make funds available as required to make payments on the contract, and to hold the United States harmless from any damage or costs resulting from cancellation of the contract. Procurements under this section are most like the procurements conducted under the Technical Cooperation Agreement.

Section 2762(b) (delayed payment) allows the foreign customer to pay for the defense articles or services delivered within 120 days after the date of billing. Meanwhile, Department of Defense funds are used to pay the contractors as required.

The third authority, section 2763 (credit sales), allows the foreign government up to 12 years to pay for the articles or services provided, which, in the meantime, are completely financed by DOD appropriations. At the time of our 1978 decision, delayed payment and credit sales were the most frequently used methods of conducting foreign military sales.

There can be no question of our settlement authority, and therefore our bid protest jurisdiction, over delayed payment and credit sales because of the substantial amounts of United States appropriations involved. Sales under section 2762(a) pose a closer question. There remains, however, a potential for United States financial involvement even in these sales that is not present in Joint Commission procurements.

First, the foreign military sales procurement contract is entered into by DOD on the basis of a promise—*i.e.,* a "dependable undertaking"—that the necessary funds will be deposited before any payment need be made. However, there is no privity between the contractor and the foreign nation. If the foreign nation is unable to meet the payment requirements, the United States must do so. In contrast, under the Technical Cooperation Agreement, no procurement contract is ever signed by a Federal agency until the full amount required is safely deposited in a Treasury dollar account. Morever, although the foreign government in a foreign military sales transaction agrees to hold the United States harmless from any damages or costs arising from *cancellation* of the contract, it does not offer the same protection should additional payments be necessary because of *claims* by the contractor for cost overruns or

for other reasons. The United States is protected, with respect to Joint Commission projects, by the right to stop work clause (section 5(d) and the hold harmless clause (section 9(a)) of the Technical Cooperation Agreement, discussed earlier. Thus, the United States is not responsible for any amounts due on the contract above a stated amount, and this amount must be deposited in the Treasury in full before a commitment to a contractor is signed.

In view of these distinctions, we affirm our decision in *Mandex, supra,* and will continue to accept bid protests in foreign military sales procurements in appropriate cases.

As explained above, the principal reason we decline to consider bid protests about typical Joint Commission project procurements is that Saudi Arabia provides all the funding. Our conclusion does not apply, of course, to the atypical project in which United States funds are used. To our knowledge, "Soleras" is the only project in which this occurs. The Soleras project agreement provides that the Department of Energy pay 50 percent of the costs. As the monies contributed by the Department of Energy to the Soleras project are appropriated funds, we would have authority to settle and adjust dollar account expenditures pertaining to that project, and thus to entertain bid protests for Soleras procurements. Should future project agreements similarly obligate the United States, it follows that the same conclusion would apply to them.

In the October 6, 1981 letter mentioned previously, Mr. Rosenthal also asked whether we had considered any cases similar or related to *Mandex, Inc., supra,* in which the Treasury Department questioned our audit authority. We have not found any such cases.

We hope we have been of assistance.

[B-206236]

Payments—Voluntary—No Basis for Valid Claim—Exception—Public Necessity—Payment in Government's Interest

Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or *quantum meruit*, applied as if contractor had not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines will be followed in future. Applying this approach, National Guard officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen.——(B-209965, July 26, 1983).

Matter of: Grover L. Miller, June 1, 1983:

The Administrative Officer, Headquarters First Battalion, 152nd Infantry, Indiana Army National Guard, has requested our reconsideration of the claim of Captain Grover L. Miller for reimbursement of personal funds he expended to purchase food supplies. Captain Miller's claim was disallowed by our Claims Group on October 28, 1981 (Settlement Certificate Z-2828580). In disallowing the claim, the Claims Group cited the proposition, embodied in numerous decisions of this Office, that a Government employee cannot create a valid claim in his favor by paying an obligation of the United States from his own funds. *E.g.,* 33 Comp. Gen. 20 (1953). At the outset, we note that the request for reconsideration was not submitted either by the claimant or the appropriate agency head as required by 4 CFR § 32.1 (1983). Nevertheless, because we think there is adequate basis to allow the claim, we will exercise our discretionary authority to reconsider the settlement action on our own motion.

Facts

The facts of this case may be stated briefly. During the times pertinent to this claim, Captain Miller was the Commanding Officer of Company C, First Battalion, 152nd Infantry, Indiana National Guard. In July 1980, he used his own funds to purchase rations for use by his unit on a weekend training mission. The food was purchased from two separate markets ($241.37 to Kroger Company and $91.61 to Gruelich's Market) for a total of $332.98.

In his written explanation of why normal purchasing procedures were not followed in this instance, Captain Miller cited several contributing factors. The principal reason, however, appears to have been that during the period in question, a single Supply Technician, with limited experience in the position, was burdened by an extremely heavy workload. Routine paperwork which was required to obtain the necessary purchasing authority was not completed in

time. As a result, Captain Miller purchased the food supplies with his own funds.

The "Voluntary Creditor" Rule

As a general proposition, as noted above, one who uses personal funds to pay what he perceives to be an obligation of the Government does not thereby create a valid claim in his favor and may not be reimbursed. This has come to be known as the "voluntary creditor" rule—the individual has voluntarily (*i.e.*, without being authorized or required by law to do so) attempted to make himself a creditor of the Government. The rule has been around for a long time. To illustrate, the Comptroller of the Treasury, in 4 Comp. Dec. 409, 410 (1898), quoted the following passage from an 1855 Treasury Department decision:

> It has been so often decided by the accounting officers that no person could acquire a *legal* [italic in original] claim against the United States by such advances, that it must now be considered as the settled adjudication of the question, at least, by that branch of the Government." " "

Ancient as the principle may be, it is nevertheless not an absolute. There are, and always have been, exceptions. In many cases, it is clear that the individual (the "voluntary creditor") exercised commendable initiative and acted in the Government's best interests. For example, we have permitted reimbursement for the purchase of food where the expenditure was incidental to the protection of life or Government property during an urgent and unforeseen emergency. 53 Comp. Gen. 71 (1973) (General Services Administration special police required to spend entire night in building which had been unlawfully occupied by demonstrators); B-189003, July 5, 1977 (FBI agents stranded in Government building during severe blizzard). Compare 42 Comp. Gen. 149 (1962); B-185159, December 10, 1975.

A 1980 decision broadened the exception somewhat to recognize that "urgent and unforeseen emergency" could, in appropriate circumstances, include mission completion short of life-threatening situations. We authorized reimbursement to an Air Force sergeant in Italy who had purchased communications equipment which could not have been obtained quickly enough to avoid mission impairment had normal procurement procedures been followed. We noted that "it would be shortsighted indeed not to recognize that this kind of initiative by the employee in an emergency is very valuable and, when it results in preserving a Government property interest, the employee should not be penalized through denial of reimbursement." B-195002, May 27, 1980.

Most recently, in B-204073, September 7, 1982, we authorized reimbursement to a military officer who used personal funds to purchase microcomputer software items for use in an ongoing research project at the Naval War College. While our decision attempted to distinguish the case on its facts from the general prohibition, the

essence of the decision was that, on the facts presented, denial of reimbursement would have produced an unduly harsh result without any compensating benefit to a legitimate Government interest.

In each case, we continually stress that payments from personal funds should be strongly discouraged. Nevertheless, the cases continue to arise. Therefore, we have chosen this case as an opportunity to re-examine the foundations of the voluntary creditor rule and to establish reasonable guidelines for the future.

The Early Decisions

The voluntary creditor rule, as we have indicated, is not new and was the subject of several early decisions. Perhaps the best discussion of the foundations of the rule is contained in 8 Comp. Dec. 582 (1902). There, the superintendent of an Indian school had contracted with a mechanic to oversee the installation of an electric plant at the school. After receiving the agreed-upon contract price of $400, the contractor claimed an additional $270 for an alleged breach by the Government, which the superintendent paid from personal funds. In denying the superintendent's claim for reimbursement, the Comptroller of the Treasury cited several factors reflecting considerations of both law and policy:

—The superintendent's voluntary payment was beyond the scope of his authority and could not operate to bind the Government.
—The superintendent was not entitled to reimbursement under a theory of subrogation nor, by virtue of the Assignment of Claims Act, could the claim be viewed as having been assigned or transferred to him.
—The claims settlement jurisdiction of "accounting officers" extends only to claims based on legal liability and not to claims based on equity or moral obligations.

In addition, the Comptroller noted that established systems exist for adjudicating claims and disbursing public funds, and an individual should not be permitted to pre-empt these procedures. To do so would "produce endless confusion and lead to double payment and serious embarrassments." 8 Comp. Dec., at 585.

While cases like 8 Comp. Dec. 582 and 4 *id.* 409 thus reflected a general prohibition, the rule was not applied blindly or arbitrarily. The early decisions recognized a significant exception for cases of "public necessity." Thus, in 8 Comp. Dec. 43 (1901), an Army medical office was reimbursed for hiring laundresses to wash bed and table linen in an Army hospital. Conceding that the question was not entirely free from doubt, the Comptroller of the Treasury stated the following proposition:

> Wherever an officer in the performance of his duty has found it necessary, in order to properly perform his duty, to advance his private funds, such an advance has been regarded by this Office, not as a voluntary and unauthorized advancement of funds creating no liability on the part of the Government, but as an advancement rendered necessary by the exigencies of a situation for the existence of which the

Government was responsible, and for which the officer was entitled to reimbursement of the amount advanced. 8 Comp. Dec., at 46.

One of the cases cited in 8 Comp. Dec. 43 was an unpublished decision of April 24, 1901, Appeal No. 5805, 17 MS Comp. Dec. 559. In that case, a soldier was reimbursed for food purchased for a group of recruits en route to their new duty station when Government-furnished rations were erroneously sent to the wrong place.[1] See also 2 Comp. Dec. 347 (1896).

This line of decisions was continued in 18 Comp. Dec. 297 (1911). A Justice Department employee had used personal funds to pay the fees of witnesses summoned to testify in a court action where there was insufficient time to follow normal authorization and payment procedures. The Comptroller allowed the claim for reimbursement, noting the voluntary creditor rule but stating:

> But this is a rule of accounting and should not be permitted to hinder the public business or prevent the payment of just and lawful claims against the Government. *Id.*, at 299.

Analysis and Conclusions

Based on our review of the body of case law on voluntary creditors, we are convinced, first, that there are sound reasons for retaining a general prohibition on reimbursement. There are well-established procedures for making purchases, submitting and adjudicating claims, and making disbursements. Keeping in mind that we are spending the taxpayers' money, the interests of the Government are best served when these procedures are followed. It is, we think, clearly undesirable for individual employees to presume to make these decisions on their own and beyond their authority based on what they believe should happen.

At the same time, however, we are equally convinced that some voluntary creditors *should* be reimbursed. The difficulty, of course, lies in drawing an appropriate line. The decisions of the Comptroller of the Treasury made considerable progress in this direction, and early GAO decisions reflected this. Thus, a 1927 decision stated the rule as follows:

> [N]o officer or employee of the Government can create a valid claim in his favor by paying obligations of the United States from his own funds *except when conditions or circumstances are shown to exist making such procedure necessary in the interest of the Government.* A-15833, March 10, 1927. [Italic supplied.]

In an apparent attempt to control potential abuse, that decision also stated that reimbursement should be permitted only in cases involving "urgent and unforeseen public necessity."

The test of "urgent and unforeseen public necessity" might have been adequate had it been properly defined in later decisions. Unfortunately, however, the phrase was used instead to tighten the rule. What had once been recognized as a "rule of accounting" (18

[1] Strictly speaking, it would be sufficient merely to cite this unpublished decision as precedent for allowing Captain Miller's claim. However, the frequency of these cases in recent years makes it desirable to address the issue more generally.

Comp. Dec. 297, *supra)* became treated, in effect, as a rule of law and acquired a rigidity it was never intended to have. Decisions of the past decade, previously discussed, evidence an attempt to escape this rigidity.

It becomes our task now, therefore, to establish reasonable guidelines for these cases in the future. The first step is to emphasize that there are certain categories of cases in which we will continue to apply the prohibition in essentially its traditional form. These are:

(1) Cases in which the underlying expenditure itself is improper, for example, where a given object is prohibited by statute or Comptroller General decision. If the agency would not be authorized to make a given expenditure directly, then the intervention of an employee as a voluntary creditor can have no effect. *E.g.,* 60 Comp. Gen. 379 (1981); 3 *id.* 681 (1924); 2 *id.* 581 (1923). The only exception will be expenditures necessary for the protection of life or Government property during an extreme emergency. *E.g.,* 53 Comp. Gen. 71, *supra.* While even this exception is not free from doubt, we will not disturb the decisions that recognize it.

(2) Cases in which an employee purchases an item primarily for his own personal use even though also in the performance of official duties, where the item is authorized, but not required, to be furnished at Government expense. Examples are 46 Comp. Gen. 170 (1966) (purchase of uniforms by Air Force hospital employees) and B-162606, November 22, 1967 (purchase of safety orthopedic shoes by automotive mechanic). If an item is required to be furnished but the Government fails to furnish it, we would not object to reimbursement of an amount administratively determined to be reasonable.

(3) Cases in which an employee uses personal funds to pay certain types of claims, not involving the procurement of goods or services, which have been filed or should have been filed against the Government. Examples are claims by Federal employees relating to compensation or tort claims. These areas are generally governed by specific statutory and/or regulatory requirements. For a variety of reasons, the normal adjudication and settlement process should be allowed to work its course. This decision does not deal with this category. For the most part, reimbursement will be prohibited. *E.g.,* 33 Comp. Gen. 20 (1953); 11 Comp. Dec. 486 (1905). Again, however, there may be rare exceptions based on unusual circumstances. See B-177331, December 14, 1972; B-186474, June 15, 1976.

The largest remaining category of cases—and the one we think warrants some redefinition—is illustrated by Captain Miller's claim: the unauthorized procurement of goods or services, where reimbursement is not prohibited under any of the three categories specified above. It is here that the most "meritorious" cases generally occur.

As with voluntary creditor cases in general, payment from personal funds is undesirable and should be discouraged. Adequate procedures exist to ensure payment to the contractor in appropriate cases. The agency may be able to "ratify" the unauthorized procurement. See in this connection section 1-1.405 of the Federal Procurement Regulations (FPR) and sections 17-204.4 and 17-205.1(d) of the Defense Acquisition Regulation (DAR). If ratification is not appropriate, the contractor's claim may be considered under a *quantum meruit/quantum valebat* theory. In general, this is the approach we think should be followed.

Occasionally, however, as this case illustrates, an individual will make payment from personal funds. An absolute prohibition on reimbursement is not mandated by precedent nor is it necessary to protect the Government's interests. Of course, the ratification and *quantum meruit* theories are, strictly speaking, not applicable because the contractor has already been paid. The Government is now dealing directly with its employee who is not a contractor. Nevertheless, we believe these theories, by analogy, offer a rational basis on which to evaluate these cases.

First, however, an important threshold test must be met—the test of "public necessity" suggested in the early decisions. The measure is the extent to which the program or activity involved would have been disrupted had the voluntary creditor not taken prompt action. The purpose of this test is to limit reimbursement to cases where there is a real need to act without delay to protect a legitimate Government interest. Reimbursement should not be allowed where an individual purchases something mainly because he thinks it is desirable, and is then able somehow to induce or pressure his agency into "ratifying" the transaction. In this latter situation, there is no reason not to follow regular procedures.

Another factor to consider is the extent to which the voluntary creditor acted on his own or was induced or "directed" to act by a superior. To the extent the voluntary creditor acted by direction, a somewhat lesser standard of "public necessity" may be applied. Even though the superior official may have been wrong, the burden should not fall on the employee who may well have felt that he had little choice but to comply.

If the "public necessity" test is favorably satisfied, the agency should next ask whether it could have ratified the transaction under whatever authority it may have (*e.g.*, FPR § 1-1.405 where applicable) if the voluntary creditor had not made payment. If the agency could have ratified the transaction to pay the contractor, it may reimburse the voluntary creditor.

If ratification is not appropriate, the claim may be considered under a *quantum meruit* approach, again applied as if the contractor had not yet been paid. The elements are (1) benefit to the Government, (2) good faith, and (3) reasonable price. The "benefit to the Government" test will already have been satisfied by virtue of

the "public necessity" determination. In determining reasonable price, the Government should, to the extent feasible, compare the price it would have paid in a regular procurement, taking into consideration such factors as tax exemptions and the availability of Government discounts. Claims under this theory, as with direct *quantum meruit* claims, should be forwarded to GAO for settlement. Of course, as we have indicated, this theory is available only where the underlying expenditure itself is authorized.

Applying the approach outlined above to Captain Miller's claim, we find the following:

(1) The National Guard personnel under Captain Miller's command were entitled to be fed at Government expense during the weekend training exercise.

(2) Captain Miller acted in the Government's best interests. The alternatives would have been either for each individual to pay for his/her food and submit separate claims for reimbursement, or presumably, disrupt the training schedule. While there was certainly no "emergency," failure to act would have impaired the mission.

(3) Captain Miller's headquarters told him, in a July 23, 1980 letter, to advise the vendor "of your actions and plans for payment to the firm." The clear inference is that Captain Miller was to pay from personal funds rather than risk adverse public relations by subjecting the vendor to lengthy claims settlement procedures.

(4) The National Guard Bureau considered "formalization" under DAR § 17-205.1(d) and concluded that it could not formalize the commitment under the DAR.

(5) The Government clearly received a benefit from Captain Miller's actions. The training mission was able to proceed without interruption and, as far as we can tell, the troops ate the food.

(6) There is no indication of lack of good faith on anyone's part.

(7) We have no reason to question the reasonableness of the price. The total cost was small and the food consisted of standard supermarket items.

In view of the foregoing, we conclude that Captain Miller should be reimbursed in the amount of $332.98.

In sum, it must be emphasized that a voluntary creditor always acts at his own risk. As pointed out since the earliest days, the voluntary creditor does not acquire a "legal claim" against the Government. In other words, he is not entitled as a matter of law to be reimbursed. Reimbursement, where permitted, is essentially an equitable measure, as is the *quantum meruit* theory itself.

In the future, we will apply the guidelines set forth in this decision in the settlement of voluntary creditor claims. While we do not find it necessary to overrule any prior decisions, they should be viewed as modified to the extent they are inconsistent with what we have said here.

[B-206619]

Officers and Employees—Transfers—Real Estate Expenses—Former Residence Utilized as a Downpayment

Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement of $163 premium paid for title insurance on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement of the fee paid for title insurance under "total financial package" concept enunciated in *Arthur J. Kerns*, 60 Comp. Gen. 650 (1981), and subsequent similar decisions.

Matter of: Roger L. Flint—Real Estate Expenses—Trade of Former Residence as Downpayment, June 1, 1983:

This decision is in response to a request by Mr. Ronald J. Boomer, an authorized certifying officer, United States General Services Administration (GSA), as to whether he may certify for payment a reclaim voucher submitted by Mr. Roger L. Flint, an employee of the agency. The voucher is for reimbursement of the premium of $163, paid by Mr. Flint for title insurance on real property traded as the downpayment on a residence he purchased at his new duty station. For the reasons hereafter stated, the cost of the title insurance in the sum of $163 may not be certified for payment.

The record discloses that by travel authorization dated October 8, 1980, Mr. Flint was officially transferred from Brunswick, Georgia, to Auburn, Washington. The employee reports that, while living in Georgia, he was renting a residence and consequently did not have a residence he could sell in order to obtain funds to pay the downpayment on the property located in Puyallup, Washington. After his transfer, Mr. Flint was renting the Puyallup property. Subsequently, the owner of the rental property decided to sell it. Since Mr. Flint needed a home for his wife and dependent father, he states that he offered the property he owned in Whitefish, Montana, as the downpayment on the Puyallup residence. The employee had occupied the Montana property as a residence in 1969 while working for the U.S. Forest Service and had subsequently leased it. In selling the Puyallup property, the owner accepted the Montana property, valued at $30,000, as the full downpayment. In conveying the Montana property, Mr. Flint purchased the title insurance at a cost of $163. Mr. Flint further reports that he lost his position with the Forest Service in a reduction in force and had been unable to sell the Montana property, which is located in a rural area. He was subsequently employed by GSA and moved to San Francisco, California. In 1977, he was transferred to Glynco, Georgia, in connection with a transfer of function. The GSA disallowed Mr. Flint's claim because no authority was found in the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), for reimbursement of expenses associated with a transfer of property as a downpayment.

Generally, the cost of title insurance is reimbursable as a legal and related expense under the provisions of FTR para. 2-6.2c, to an employee incident to the sale of a residence. In this connection, GSA, the agency involved in this claim, has determined that the title insurance fee of $163 is reasonable in amount and would normally have been paid by Mr. Flint as a seller in the sales transaction under consideration. However, although the premium paid for title insurance is generally reimbursable, the specific question presented here is whether the trade-in of the Montana property, as the downpayment on the Puyallup residence, may be considered as part and parcel of the "total financial package" put together to enable Mr. Flint to purchase the Puyallup property. Our reply is in the negative.

The common thread, the common denominator, present in our recent decisions in this area, namely, *Arthur J. Kerns,* 60 Comp. Gen. 650 (1981); *Robert L. Hengstebeck,* B-200083, September 29, 1981; *Leland D. Pemberton,* 61 Comp. Gen. 607 (1982); and *James R. Allerton,* B-206618, March 8, 1983, is that the financial transactions involved in each of the cited decisions, i.e., a second mortgage, a release of liability, deeds of trust, and new mortgage, were secured by the employee's interest in his residence at his old duty station or his residence at his new duty station at the time of the transfer. See *Allerton,* cited above. Since the employee, in most instances, must sell his old residence or secure a second mortgage on the old or new residence in order to purchase a residence at his new official station, we viewed the financial transactions, each of which involved the employee's security interest in his residence at his old or new duty station as being, in reality, one total financial package.

The claim before us is distinguishable from the principle initially enunciated in the *Kerns* case. The cost incurred by Mr. Flint in the purchase of title insurance was incident to the trade-in of the Montana property as the downpayment on the purchase of the Puyallup residence. The utilization of property as a downpayment has been recognized by this Office, for purposes of reimbursement, as a valid financial transaction and tantamount to a cash payment. B-166419, April 22, 1969. We have also approved the trade-in of a house trailer as part of the downpayment on a residence purchased by an employee. B-168123, December 9, 1969. But here, the premium paid for the title insurance, while otherwise reimbursable, was incurred in connection with the trade-in of the Montana property, a former residence, but not the residence of Mr. Flint at the time of his official transfer to Auburn, Washington.

In this regard, FTR para. 2-1.4i, in describing a residence in connection with reimbursement of real estate expenses, defines official station or post of duty as the residence or other quarters from which the employee regularly commutes to and from work. *Robert C. Kelly,* B-189998, March 22, 1978. Mr. Flint's former residence

(the Montana property) was neither located at his old official station in Glynco, Georgia, or at his new official station in Auburn, Washington, nor did he commute on a daily basis from the Montana residence to his old official duty station in Glynco. Further, the Montana property was not Mr. Flint's residence at the time he was first definitely informed by competent authority that he was to be transferred to his new official station in Auburn, Washington. FTR para. 2-6.1d; B-177583, February 9, 1973.

Accordingly, and utilizing the "total financial package" concept enunciated in *Kerns* and our subsequent similar decisions, there is no authority to permit reimbursement to Mr. Flint of the cost of the title insurance incurred in connection with the trade-in of the Montana property as the downpayment on the Puyallup residence at his new official duty station. The reclaim voucher may not be certified for payment.

[B-207441]

General Accounting Office—Jurisdiction—Subcontracts

Protest against award of subcontract on behalf of Government by Department of Energy prime contractor is appropriate for General Accounting Office review under standards of *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Nonunion protester, whose bid prime contractor did not open, is interested party, in particular circumstances, for purposes of protesting requirement for subcontractors to have union agreement notwithstanding that protester withdrew its bid. B-204037, Dec. 14, 1981, is amplified.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Significant Issue Exception—For Application

General Accounting Office will consider protest challenging requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions since significant issue is involved.

Bids—Rejection—Subcontractor's Bid—Failure To Comply With "Union-Only" Requirement

Requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions neither unduly restricts competition nor conflicts with Federal norm so long as prime contractor permits nonunion firms to compete for contracts and affords them opportunity to seek prehire agreements under the National Labor Relation Act.

Matter of: Anderson and Wood Construction Company, Inc., June 2, 1983:

Anderson and Wood Construction Company, Inc. (Anderson), protests a subcontract procurement conducted on behalf of the Department of Energy (DOE) by the Morrison-Knudsen Company, Inc. (MK), a DOE construction management contractor. All parties agree that this subcontract protest is appropriate for our review under our decision in *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

We deny the protest.

MK initiated this procurement in February 1982 by issuing a "request for proposals" (RFP) for the upgrading of an electrical substation at DOE's Idaho National Engineering Laboratory (INEL). The RFP stated that proposals were due in March 18, 1982, "after which the public bid opening will promptly commence." (In view of this language, we will treat this as an advertised procurement.) MK solicited bids from 11 firms and also provided copies of the solicitation to several contractor associations.

MK is party to a collective-bargaining agreement with the unions in the INEL area. The agreement stipulates, in part, that MK will not subcontract any work at the INEL site to any contractor which is not also party to a union agreement. This agreement was not mentioned in the solicitation.

During the first week of March 1982, Anderson contacted MK to obtain a copy of the solicitation. This contact precipitated written advice to Anderson from an MK representative that Anderson "would not be accepted" unless MK received Anderson's "commitment to use union personnel." On March 17, Anderson representatives met with officials of the local union of the International Brotherhood of Electrical Workers (IBEW). As we understand the meeting, the local asked that Anderson accept a companywide bargaining agreement applicable anywhere within the local's jurisdiction, while Anderson sought an arrangement applicable only to the site. The meeting ended without agreement.

Anderson submitted its bid and a sealed letter on March 18. At the appointed time, MK's representative opened and read the other bids and then opened Anderson's letter. The letter stated that Anderson fully intended to abide by all INEL practices but that Anderson had been unsuccessful in working out an accord with the local union; therefore, the company "[found] it very difficult to comply with [MK's] 'union-only' request." After reading Anderson's letter, MK's representative announced that the public bid opening was closed, but did not open Anderson's bid. DOE insists, however, that MK informed Anderson that it would "take Anderson's bid under advisement." After some discussion, Anderson sought and obtained the return of its unopened bid.

Anderson protested orally to MK on April 6, 1982, and was advised by MK that its protest would have to be filed in writing within 10 days in order to be considered. Anderson filed its protest with MK on April 12. DOE denied Anderson's protest on April 28. Anderson filed this protest with our Office on May 10, 1982.

Anderson contends that MK's failure to open its bid was tantamount to a rejection of its bid solely because Anderson is a nonunion firm and argues that MK excludes nonunion firms from the competition for these subcontracts. Anderson asserts that this policy is unduly restrictive and violates the requirement that prime contractors contracting for the Government adhere to the

"Federal norm"—a shorthand reference to certain fundamental principles of Federal procurement law applicable to subcontract awards reviewable by our Office. Anderson also asserts that MK cannot justify this policy on the basis of concern for labor unrest because the onsite unions cannot strike against MK or any other contractor at INEL to enforce the restrictive subcontracting clause in MK's collective-bargaining agreement without violating the "no-strike" provisions of that agreement or the National Labor Relations Act. Anderson also asserts that if the unions were to picket Anderson, it would neither disrupt Anderson's work nor, given the remote location of the substation, would it affect other work at INEL. Last, Anderson contends that the restrictive provisions of MK's collective-bargaining agreement are irrelevant to this protest because "the only issue here is whether the union-only practice is in conformance with the 'federal norm,' not whether the practice has its origins in a collective-bargaining agreement."

MK and DOE assert that Anderson's characterization of MK's policy as being one of excluding nonunion bidders is inaccurate. As stated by DOE:

> It is MK's policy to solicit proposals from all qualified suppliers as evidenced by twenty four open shop firms who are on MK's bid lists. In addition, MK has awarded subcontracts to fifteen open shop firms. In each case the successful bidder has been able to negotiate a specific project agreement with the appropriate union which is limited to the work at the specific INEL job site. MK has never rejected a low bidder on the basis that it was nonunion. Based upon our previous experience at the INEL site and the attached letter from the IBEW [see below *], we believe that * * * Anderson and Wood * * * could have entered into a project agreement applicable only to the Scoville Substation job site.
>
> * The IBEW letter to which MK refers states, in part, "On the question you asked, if we would have worked out an agreement on the substation if Anderson had gotten the job, the answer is yes."

DOE and MK also argue that MK's policy is a reasonable restriction on competition based on MK's recognized interest in avoiding labor strife and assert that the restrictive provision on which MK bases this policy is part of a legally enforceable collective-bargaining agreement with which MK is obligated to comply.

DOE and MK also question the timeliness of Anderson's protest under our Bid Protest Procedures, 4 C.F.R. part 21 (1983). In this respect, DOE and MK contend that Anderson is protesting an "impropriety apparent in a solicitation" and that Anderson therefore should have filed its protest prior to bid opening. *See* 4 C.F.R. § 21.2(b)(1). Alternatively, DOE and MK argue that Anderson's protest is untimely because it was not filed within 10 working days of bid opening—when Anderson, at the latest, should have learned of the basis for its protest. *See* 4 C.F.R. § 21.2(b)(2). DOE and MK argue that, under either interpretation of events, Anderson's protest is untimely.

DOE also argues that we have considered the precise issue here—whether a "union-only" policy comports with the Federal norm—in *Motley Construction Company, Inc.*, B-204037, December

14, 1981, 81-2 CPD 465 (*Motley*), and states that Anderson's protest therefore does not fall within the "significant issue" exception to the timeliness requirements of our Procedures, 4 C.F.R. § 21.2(c).

Anderson argues that its protest is timely and that, even if it were not, we should consider it on the merits under the significant issue exception.

We need not decide whether Anderson's protest is timely because we consider the issue in this procurement to fall within the significant issue exception to our timeliness requirements. We reach this conclusion mindful of *Motley.* In *Motley,* we did not decide that *any* union-only policy—or actions under that policy—complies with the Federal norm. Moreover, *Motley* involved a protester who refused to take *any* steps to reach an accord with the onsite unions unlike Anderson in this procurement. If we accept Anderson's view for the moment, it was rejected *solely* for lacking a union agreement. Thus, we consider it appropriate to decide the propriety of the particular union-only policy involved here as well as to amplify on our observations in *Motley* about union-only requirements.

In our opinion, MK's policy does not unduly restrict competition and is consistent with the Federal norm so long as MK permits nonunion bidders to compete for these contracts and affords them the opportunity to seek prehire agreements with the unions.

We recognize that there is no legal justification for the rejection of the lowest bid received solely because the low bidder may not employ union labor. *See* 31 Comp. Gen. 561 (1952), cited by Anderson. Nevertheless, it is also settled that the potential for labor unrest is a legitimate interest in the evaluation of a prospective awardee's responsibility. *Motley, supra;* 43 Comp. Gen. 323 (1963). Any such evaluation must include consideration of the subcontracting restriction in MK's collective-bargaining agreement if MK is to avert labor problems. In this regard, we have held in an analogous context (*see* 53 Comp. Gen. 51 (1973)) that we consider it reasonable for a contractor to be more concerned with whether the contract would be performed properly and without interruption rather than with whether the contractor would ultimately prevail in litigation, a consideration which we think might occur to MK concerning the possibility of litigation to halt strikes or other labor action which might result from MK's breach of its agreement. Moreover, we find nothing in MK's collective-bargaining agreement which would give MK the right to dictate or specify the terms of the subcontractor—onsite union agreement—and we think it would be inappropriate for considerations of the Federal norm to intrude into what are essentially labor negotiations between private parties for a prehire agreement under the National Labor Relations Act.

In these circumstances, we are persuaded of the reasonableness of MK's requirement for its subcontractors to have an agreement with the onsite unions. The protest is denied.

In future procurements, however, we recommend that MK keep in mind that a potential contractor's ability or inability to avoid conflicts with onsite labor organizations is a matter of responsibility. Questions concerning a bidder's responsibility may be resolved, time permitting, after bid opening at any time up to the award of the contract. See, e.g., *Gaffny Plumbing and Heating Corporation*, B-206006, June 2, 1982, 82-1 CPD 521. Absent any indication in the record before us of any urgent requirement for immediate award of the contract, we are persuaded that MK should have opened and considered Anderson's bid and afforded Anderson a reasonable opportunity to reach an agreement with the onsite unions.

Futhermore, this protest is traceable directly to MK's failure to notify prospective bidders in the solicitation of this requirement and its application to this procurement. We therefore recommend that future solicitations for construction work at INEL clearly apprise bidders of this policy. In addition, future solicitations should not use, as a matter of sound policy, the designation "request for proposals" where an advertised procurement is intended.

[B-210346]

Pay—Retired—Foreign Employment—Congressional Consent—Pub. L. 95-105—Applicability

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Art. I, sec. 9, cl. 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government.

Matter of: Lieutenant Colonel Marvin S. Shaffer, USAF, Retired, June 2, 1983:

This decision responds to a request from the Acting Assistant Secretary of Defense (Comptroller) concerning the limitations of Article I, section 9, clause 8 of the Constitution and the application of section 509 of Public Law 95-105, to those retired members of uniformed services employed by American corporations whose principal shareholders are foreign corporations which are in turn controlled by foreign governments. We do not find that the Constitutional provision or Public Law 95-105 is applicable.

This request for decision has been assigned Committee Action Number 556 by the Department of Defense Military Pay and Allowance Committee.

The Air Force is in receipt of a DD Form 1357, Statement of Employment, dated August 31, 1981, from Lieutenant Colonel Marvin S. Shaffer, USAF, Retired. It indicates that Colonel Shaffer is employed by American Motors Corporation (American Motors) as

director of that firm's "China Project." This is apparently a "joint venture" between American Motors and the People's Republic of China, but the exact nature of the arrangement is unknown. The Committee Action notes that 46.9 percent of American Motors' stock has been acquired by the French automotive firm of Regie Nationale des Usines Renault (Renault), 92 percent of which is owned by the French government. Further, Colonel Shaffer has not requested or obtained permission from the Secretary of State and the Secretary of the Air Force to accept "foreign employment" as required by section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978, Public Law 95-105, August 17, 1977, 91 Stat. 844, 859-860, 37 U.S.C. 801 note.

On the basis of these facts the submission poses the question:

> Whether a corporation, incorporated in the United States, becomes an instrumentality of a foreign government when its principal stockholder is a foreign corporation substantially owned by a foreign government, so as to subject retired members of the uniformed services employed by such corporation to the constraints of Article I, section 9, clause 8 of the Constitution?

Article I, section 9, clause 8 of the Constitution prohibits any person "holding any Office of Profit or Trust" under the United States from accepting any compensation, office or title from a foreign government without the consent of Congress. It is well established that that prohibition applies to retired members of the uniformed services. 58 Comp. Gen. 487 (1979), and cases cited therein. However, by enacting section 509 of Public Law 95-105, cited above, Congress gave its consent to the employment by foreign governments in the case of various categories of personnel, including retired members of a Regular component of a uniformed service, provided they receive the approval of both the Secretary of State and the Secretary of their service or department.

However, we feel that neither Article I, section 9, clause 8, nor section 509 of Public Law 95-105 is applicable in this case.

The Committee Action refers to a decision of the Comptroller General, 53 Comp. Gen. 753 (1974), in which we concluded that a retired Regular officer of the Air Force, although nominally employed by a domestic corporation, was actually employed by a foreign corporation which was a wholly owned instrumentality of a foreign government. In that case the foreign corporation was determined to be the instrumentality of the foreign government. It was further determined that the corporation had the right to control and direct the retiree as an employee; i.e., in the performance of his work and the manner in which it was to be done. In that decision we relied upon the common law of agency. In this case, it is also necessary to rely on some of the principles of the law of corporations. While these principles were developed for entirely different reasons, we find that their application in situations such as this one will adequately protect the interests of the United States without being overly restrictive on the individuals involved.

As a general rule, a corporation is a legal entity separate and distinct from its shareholders. However, where equity dictates the corporate entity will be disregarded. For example, this may be done when there is such unity of interest and ownership that the separate personalities of the corporation and its shareholders no longer exist. *FMC Corporation* v. *Murphree,* 632 F.2d 413 (1980). Also, when a parent corporation used its subordinate corporation as an instrumentality or mere agent, the corporate entity was disregarded. *C. M. Corporation* v. *Oberer Development Co.,* 631 F.2d 536 (1980). These are but two of many variables to be considered in establishing whether a corporate entity should be disregarded in dealing with corporations and their shareholders. For the purposes of this decision we do not believe a detailed discussion of these concepts is necessary.

Here, Colonel Shaffer is an employee of American Motors Corporation, a domestic corporation. While it is true that a controlling interest has been acquired by a foreign corporation, which is in turn controlled by a foreign government, we find no basis to disregard the corporate entity of American Motors Corporation. No indication or evidence appears which requires a conclusion that American Motors is acting as an agent or instrumentality of Renault. Nothwithstanding that both American Motors and Renault may have common directors, we see no indication that American Motors and Renault are not separate entities.

Accordingly, since Colonel Shaffer is employed by a domestic corporation which appears to be a separate legal entity from its dominant shareholder, and the power to control and direct his employment is with the domestic corporation, it is our view that no violation of Article I, section 9, clause 8 of the Constitution exists. As a result, it is not necessary for Colonel Shaffer to seek the Secretarial approval required by Public Law 95–105. Additionally, we do not view the fact that Colonel Shaffer will be working on the "China Project" as having any bearing so long as his employment is exclusively with American Motors. The basic question is answered in the negative. Since the two other questions presented were contingent on an affirmative answer, they are not relevant.

We would like to add that in circumstances where it appears that a domestic corporation is ultimately controlled by a foreign government and the domestic corporation acts as an agent or instrumentality of a foreign government, the approval required by Public Law 95–105 should be secured prior to employment. Since this is a complex area, and in order to avoid a violation, if any doubt exists concerning an employment situation, the individual concerned should request the required approval.

[B-210232]

Compensation—Double—Severance Pay

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a).

Compensation—Severance Pay—Eligibility—Actual Separation Requirement

Certain HUD employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be actually separated from United States Government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board.

Matter of: HUD Employees—Severance Pay—Retroactive Reduction-in-Force, June 3, 1983:

Ms. Deborah S. DuSault, Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), has requested an advance decision under our procedures for labor-management relations cases found at 4 C.F.R. Part 22 (1983). The interested parties were served with copies of that request in accordance with those regulations. The American Federation of Government Employees (AFGE) submitted a response. In reaching our decision, we have considered all materials provided to us.

This request concerns the entitlement to severance pay of certain former HUD employees whose employment was terminated by a reduction-in-force (RIF), after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued in a pay status and performed their normal duties with HUD. After the injunction was lifted, HUD made the RIF retroactively effective. The essential issues before us are whether the employees are entitled to severance pay, and if they are, in what amounts and when should the payments begin. For the reasons set forth below, we hold that the employees are entitled to receive severance pay, with the payments beginning following their actual separation on December 10, 1982, based upon their years of service and pay rates as of the date of the retroactively effective RIF.

On August 20, 1982, HUD issued a general RIF notice. Specific RIF notices were issued September 29, 1982, with an effective date of October 31, 1982. However, on October 29, 1982, the United States District Court for the District of Columbia, in *American Federation of Government Employees* v. *Pierce,* Civil Action No. 82-3111

(D.D.C. 1982), granted a temporary restraining order staying the RIF. This was followed on November 15, 1982, by the issuance of a permanent injunction in the same action. The court's order was based on language prohibiting the use of appropriated funds for certain reorganizations within HUD prior to January 1, 1983, without the approval of the Committees on Appropriations. Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1983, Pub. L. 97-272, September 30, 1982, 96 Stat. 1160, 1164. This injunction was reversed by the United States Court of Appeals for the District of Columbia Circuit on December 8, 1982, holding that the basis for the permanent injunction, the restriction on the use of appropriated funds, was, in fact, an unconstitutional legislative veto. *American Federation of Government Employees*, v. *Pierce*, No. 82-2372 (D.C. Cir. 1982).

On December 9, 1982, HUD notified the affected employees that they would be separated at the close of business on December 10, 1982. The separations were made retroactively effective to October 31, 1982. We have been informed by HUD officials that if the separations had not been made retroactively effective, the retention status, under 5 C.F.R. Part 351, Subpart E (1982), of some affected employees would have changed, necessitating the separation of some different employees in place of some of those originally given RIF notices. It is contended that this would result in the injunction creating new rights, which HUD views as being prohibited by *Pauls* v. *Seamans*, 468 F.2d 361 (1st Cir. 1972).

We have not been asked to—and will not—decide the issue of the propriety of retroactively effecting the RIF. We have been informed that that issue is currently before the Merit Systems Protection Board (MSPB) for decision, the proper forum for consideration of the issue. Instead, we will assume—without deciding—that the retroactive RIF was proper, so that we may answer the questions asked. The AFGE submission contests the propriety of the RIF. Since we are not considering that issue, we will not discuss AFGE's position on the issue.

During the period that the RIF was stayed by the court, the affected employees continued their employment. The agency contends that these employees were "de facto" employees who are entitled to pay, but not creditable service. In support of this position, they cite our decision *Victor M. Valdez, Jr.*, 58 Comp. Gen. 734 (1979), analogizing this situation to that of a person who serves after his appointment expires.

Specifically, the agency poses these two questions:

1. If the severance pay is effective on November 1, 1982, can the Department legally pay the severance pay in light of the dual compensation restrictions?

2. If the agency is precluded from paying the severance pay until December 11, 1982, is the employee entitled to severance pay that would have been received during the 6-week injunction period, November 1, through December 10, 1982, or would the employee forfeit 6 weeks of severance pay?

DUAL PAY PROHIBITION

The first issue is whether the prohibition on pay from more than one position contained in 5 U.S.C. § 5533(a) (1976) prohibits the payment of severance pay under 5 U.S.C. § 5595 (1976) to the affected HUD employees. Under section 5595, an employee employed currently for a continuous period of at least 12 months who has been involuntarily separated—not by removal for cause on charges of misconduct, delinquency, or inefficiency—is entitled to be paid severance pay. Under section 5533(a), an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week.

Under section 5533(a), the prohibition is on "basic pay" from more than one position. The implementing regulations for section 5533 define "pay" as "pay paid for services." 5 C.F.R. § 550.502(b) (1982). We view severance pay as a benefit paid upon involuntary separation, rather than as "pay paid for services." The involuntary separation—not the provision of services—gives rise to the entitlement to severance pay. This view is reinforced by subsection 5595(f), which provides that severance pay under that section is not a basis for the computation or payment of any other type of Government benefit, and a period covered by severance pay is not a period of United States Government service. Therefore, section 5533(a) has no application to the receipt of severance pay. The prohibition on dual pay from more than one position contained in section 5533(a) does not prohibit the payment of severance pay under section 5595 in this case.

WHEN SEVERANCE PAY ENTITLEMENT BEGINS

The second issue is whether severance pay should be paid to the employees during the period that the RIF was stayed by the court, while they continued their employment.

We view severance pay as being incompatible with pay for services rendered. In our decision B-178446, May 4, 1973, we stated that in order for an individual to receive severance pay, he must be separated from the United States Government service. The agency contends that those HUD employees should be treated as if they had actually been separated on the originally planned date of separation, not on the date of actual separation following the lifting of the injunction. The agency relies upon *Pauls* v. *Seamans,* cited above, which prohibits the acquisition of rights through an injunction that is eventually lifted. That case was based on the theory that an injunction is intended to maintain the *status quo ante.* During the period that the RIF was stayed by the court, and the affected employees continued their employment, the agency believes these employees were "de facto" employees who were entitled to pay, but not creditable service. They rely upon our decision in *Valdez,* cited above, analogizing this situation to that of a person

who serves after his appointment has ended. Such a person does not satisfy the definition of an "employee" in 5 U.S.C. § 2105 (Supp. IV 1980), as an individual who is appointed in the civil service by a designated official. It is AFGE's contention that the affected employees remained "employees" under section 2105 until the day they were actually separated, December 10, 1982.

Whether the affected employees were "de facto" employees, or employees under section 2105, is not relevant to this decision. The employees' status during the period of the injunction will depend upon whether the MSPB upholds the retroactive effective date of the RIF. For purposes of severance pay, since we have already held that the payment of severance pay cannot begin until an employee is actually separated, no entitlement to severance pay exists until the employee actually leaves the payroll. Thus, for these employees, until they were actually separated on December 10, 1982, there was no entitlement to severance pay. Just as the RIF was stayed by the court's order, so was the employees' entitlement to severance pay. Therefore, beginning on December 10, 1982, the employees who were separated in the RIF are entitled to receive severance pay. Since we have assumed—without deciding—for purposes of this decision that the retroactive RIF was proper, we believe that the amount of severance pay and the period of entitlement to severance pay should be the same as if the employees had been separated on October 31, 1982, as originally intended by HUD.

Accordingly, the affected individuals' rights to section 5595 severance pay should be treated as starting on the day that they were actually separated—December 10, 1982, but with the amount of severance pay computed on the basis of each such individual's pay rate and years of service as of the date the RIF would have gone into effect had there been no injunction—October 31, 1982. If the Merit Systems Protection Board decides that the RIF should not have been retroactively effected, then the changes in pay rate and time of service during the period of the injunction should be included in computing their severance pay entitlement.

[B-210555]

Vehicles—Government—Home To Work Transportation—Government Employees—Prohibition

GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to the heads of Foreign service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so.

Vehicles—Government—Home To Work Transportation—Government Employees—Prohibition—Exemptions

GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments.

Vehicles—Government—Home To Work Transportation—Government Employees—Prohibition—Exemptions

GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. 1344(b)(3), to include those high ranking officials whose duties require frequent official contact on a diplomatic level with high ranking officials of foreign governments. GAO construes 31 U.S.C.1344(b)(3) to only include those persons who have been properly appointed, or have properly succeeded, to head a foreign diplomatic, consular, or other Foreign Service post, as an ambassador, minister, charge d'affaires, or other similar principal diplomatic or consular official.

Vehicles—Government—Official Use Determination—Administrative Discretion

The State Department's reliance on the GAO decision in 54 Comp. Gen. 855 (1975) to support the proposition that the use of Government vehicles for home-to-work transportation of Government officials and employees lies solely within the administrative discretion of the head of the agency was based on some overly broad dicta in that and several previous decisions. Read in context, GAO decisions, including the one cited by the State Department's Legal Advisor, only authorize the exercise of administrative discretion to provide home-to-work transportation for Government officials and employees on a temporary basis when (1) there is a clear and present danger to Government employees or an emergency threatens the performance of vital Government functions, or (2) such transportation is incident to otherwise authorized use of the vehicles involved.

Vehicles—Government—Home To Work Transportation—Government Employees—Misuse of Vehicles—Liability of Employees

Because so many agencies have relied on apparent acquiescence by the Congress during the appropriations process when funds for passenger vehicles were appropriated without imposing any limits on an agency's discretion to determine the scope of "official business," and because dicta in GAO's own decisions may have contributed to the impression that use of cars for home-to-work transportation was a matter of agency discretion, GAO does not think it appropriate to seek recovery for past misuse of vehicles (except for those few agencies whose use of vehicles was restricted by specific Congressional enactments). This decision is intended to apply prospectively only. Moreover, GAO will not question such continued use of vehicles to transport heads of non-cabinet agencies and the respective seconds-in-command of both cabinet and non-cabinet agencies until the close of this Congress.

Matter of: Use of Government vehicles for transportation between home and work, June 3, 1983:

We have been asked by the Chairman of the House Committee on Government Operations to review a Department of State, July 12, 1982 legal memorandum and an earlier Department of Defense legal opinion which interpret the exemptions in 31 U.S.C. § 1344(b)

(formerly 31 U.S.C. § 638a(c)(2)) from the prohibition in 31 U.S.C. § 1344(a) against using appropriated funds to transport Government officials between their homes and places of employment. Relying on these interpretations, the Department of State has expanded its internal list of officials for whom such transportation is authorized. The Chairman seeks our opinion on whether that action is in accordance with the meaning and intent of the law. As explained below, it is our opinion that the determination of the State Department (and that of the General Counsel of the Department of Defense, Legal Opinion No. 2, October 12, 1953, upon which the State Department action is based) is not in accordance with the law.

Notwithstanding these conclusions, we recognize that the use of Government-owned or leased automobiles by high ranking officials for travel between home and work has been a common practice for many years in a large number of agencies. (See, for example, our report to the Senate Committee on Appropriations on "How Passenger Sedans in the Federal Government are Used and Managed," B-158712, September 6, 1974.) The justification advanced for this practice is the apparent acquiescence by the Congress which regularly appropriates funds for limousines and other passenger automobiles knowing, in many instances, the uses to which they will be put but not imposing limits on the discretion of the agencies in determining what uses constitute "official business."

In addition, the General Accounting Office (GAO) may, itself, have contributed to some of the confusion. As we studied our past decisions in order to respond to the Chairman's request, we recognized that in some instances, we may have used overly broad language which implied exceptions to the statutory prohibition we did not intend. (This will be discussed in more detail later.) For these reasons, we do not think that it is appropriate to seek recovery from any officials who have benefited from home-to-work transportation to date. Our interpretation of the law is intended to apply prospectively only.

Finally, we note that the GAO has made several legislative recommendations to the Congress over a period of years to clarify its intent about the scope of the prohibition. Among other things, we suggested that the Congress consider expanding the present exemption to include the heads of all agencies and perhaps their principal deputies. This decision, therefore, need not be considered effective with respect to agency heads and their principal deputies until the end of the present Congress in order to allow the Congress sufficient time to consider our suggestions. (This does not, of course, include any agency whose use of motor vehicles has been the subject of a specific Congressional restriction.)

The Law

Section 1344 of title 31 of the United States Code states:

(a) Except as specifically provided by law, an appropriation may be expended to maintain, operate, and repair passenger motor vehicles or aircraft of the United States Government that are used only for an official purpose. An official purpose does not include transporting officers or employees of the Government between their domiciles and places of employment except—

(1) medical officers on out-patient medical service; and

(2) officers or employees performing field work requiring transportation between their domiciles and places of employment when the transportation is approved by the head of the agency.

(b) This section does not apply to a motor vehicle or aircraft for the official use of—

(1) the President;

(2) the heads of executive departments listed in section 101 of title 5; or

(3) principal diplomatic and consular officials.

Since vehicles may not be operated with appropriated funds except for an "official purpose" and the term "official purpose" does not include transportation between home and work (except as otherwise specifically provided), we regard subsection (a), above, as constituting a clear prohibition which cannot be waived or modified by agency heads through regulations or otherwise.

While the law does not specifically include the employment of chauffeurs as part of the prohibition in subsection (a), GAO has interpreted this section, in conjunction with other provisions of law, as authorizing such employment only when the officials being driven are exempted by subsection (b) from the prohibition. B-150989, April 17, 1963.

The State Department Determination

After researching and considering the provisions of section 1344, the State Department's Legal Advisor informed the State Department's Under Secretary for Management (in a memorandum dated July 12, 1982) that there is "no legal impediment" to authorizing the State Department's Under Secretaries and Counselor to use Government vehicles and drivers for transportation between their homes and places of employment. (Previous to that opinion, the State Department had restricted such transportation to the Secretary and Deputy Secretary.) The Legal Advisor founded his determination upon several bases.

For his first basis, the Legal Advisor relied upon an October 12, 1953 opinion by the General Counsel of the Defense Department which concluded that the phrase "heads of executive departments" contained in 31 U.S.C. § 1344(b)(2) (then referred to as section 16(a)(c)(2) of the Act of August 2, 1946, 60 Stat. 810) "is not limited to Cabinet Officers or Secretaries of executive departments, but includes also the principal officials of executive departments appointed by the President with the advice and consent of the Senate." Applying the DOD General Counsel's conclusion, the State Department's Legal Advisor found that the Secretary, Deputy Secretary,

Under Secretaries, and Counselor (whom he refers to as the "Seventh Floor Principals") may be regarded as "heads of departments" for the purposes of section 1344(b)(2), and are therefore eligible to use Government vehicles and drivers for home-to-work transportation.

Secondly, the Legal Advisor determined that home-to-work transportation for the Seventh Floor Principals is also authorized based upon his construction of the exemption in section 1344(b)(3) for "principal diplomatic and consular officials." The Legal Advisor stated in his memorandum that the Seventh Floor Principals "all share in discharge of the Secretary's diplomatic responsibilities in much the same way as ambassadors abroad; and the [State] Department * * * is uniquely qualified to determine what diplomatic functions are and who performs them." In his interpretation, the restriction on home-to-work transportation in section 1344(a) would not apply to the Seventh Floor Principals because they are all "principal diplomatic * * * officials."

For his final basis, the Legal Advisor cited our decision in 54 Comp. Gen. 855 (1975). That decision, according to the Legal Advisor, "holds that where there is a clear and present danger, use of Government vehicles to transport employees to and from home is not proscribed." The Legal Advisor also quoted the following passage from that decision:

> In this regard we have long held that use of a Government vehicle does not violate the intent of the cited statute where such use is deemed to be in the interest of the Government. We have further held that the control over the use of Government vehicles is primarily a matter of administrative discretion, to be exercised by the agency concerned within the framework of applicable laws. 25 Comp. Gen. 844 (1946). 54 Comp. Gen. at 857.

Based upon that passage, the Legal Advisor concluded that GAO's decisions support the proposition that home-to-work transportation is permissible whenever there is an administrative determination by the head of the agency that this would be in the interest of the Government, and not merely for the personal convenience of the employee or official concerned.

The Legal Advisor then referred to the Foreign Affairs Manual (FAM) to demonstrate that the Secretary, Deputy Secretary, Under Secretaries and Counselor "share in discharging the substantive responsibilities of the Secretary," and have been placed by law in the order of succession to be Acting Secretary of State. According to the Legal Advisor, those officials "constitute a management group—the Seventh Floor Principals." The Legal Advisor noted that those officials have "heavy after hours official representation responsibilities and a heavy load of other official responsibilities which requires virtually around the clock accessibility * * *." The Legal Advisor concluded that these considerations "would support an administrative determination that it is in the interest of the United States, not personal convenience," to provide home-to-work

transportation for the Seventh Floor Principals. In his opinion, such a determination would satisfy the requirements of GAO's decisions.

Discussion

We disagree with the analysis and conclusions of the Legal Advisor. With regard to the Legal Advisor's first basis, we have reviewed the October 12, 1953 Legal Opinion No. 2 of the General Counsel of the DOD, upon which the Legal Advisor relied. (We have been informally advised that DOD has never overturned or modified that opinion although, as a matter of internal policy it has, over a period of years, curtailed the use of Government vehicles for such transportation.) We do not agree with the DOD General Counsel's conclusion that the exemption in subsection 1344(b)(2) for "the heads of executive departments listed in section 101 of title 5" includes the "Principal officers of executive departments appointed by the President with the advice and consent of the Senate." The term "heads" of executive departments is not synonymous with the term "principal officers," particularly when the "head" of each of the 13 "executive departments" listed in section 101 of title 5 is explicitly designated in other statutory provisions. For example, 10 U.S.C. § 133 provides that "[t]here is a Secretary of Defense, who is the head of the Department of Defense * * *." [1] In 22 U.S.C. § 2651, it is provided that "[t]here shall be at the seat of government an executive department to be known as the Department of State, and a Secretary of State, who shall be the head thereof." (The State Department's own regulations provide that the Secretary of State "is the head of the Department of State." 1 FAM 110 (June 18, 1976).) Similar designations of the "head" of each of the other "executive Departments" may also be found in the United States Code. 49 U.S.C. § 1652 (Transportation); 42 U.S.C. § 3532 (Housing and Urban Development); 29 U.S.C. § 551 (Labor); 15 U.S.C. § 1501 (Commerce); 43 U.S.C. § 1451 (Interior); 31 U.S.C. § 301 (Treasury); 42 U.S.C. § 7131 (Energy); 42 U.S.C. § 3501 note, *as amended by* 20 U.S.C. § 3508 (Health and Human Services); 28 U.S.C. § 503 (Justice); 7 U.S.C. § 2202 (Agriculture); 20 U.S.C. § 3411 (Education). Therefore, we construe subsection (b)(2) of section 1344 to refer strictly to those officers who are appointed (or who duly succeed) to the positions designated by law to be "the heads of executive departments" as listed in 5 U.S.C. § 101.

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[1] There is one statutory exception for the Department of Defense. When the Department of Defense was created by the National Security Act Amendments of 1949, Pub. L. No. 81-216, 81st Cong., 1st Sess., 63 Stat. 578, 591-92 (1949), Congress expressly provided in subsection 12(g) that, despite the consolidation of the three military departments into the DOD, the Secretaries of the Army, Navy, and Air Force continue to be vested with the statutory authority which was vested in them when they enjoyed the status of Secretaries of executive departments, *See e.g.*, S. Rep. No. 366, 81st Cong. 25 (1949). That authority is to be exercised subject to the discretion and control of the Secretary of Defense. *Id.* For this reason, the Secretaries of the Army, Navy, and Air Force may also be regarded as heads of the executive departments, even though their respective agencies are not listed in 5 U.S.C. § 101.

Morever, the legislative history upon which the General Counsel relied does not support his conclusions. For example, the General Counsel cited the Act of March 3, 1873, 17 Stat. 485, 486, and the debate on that Act in the Congressional Globe, 42d Cong., 3rd Sess. 2104 (1873), for the proposition that "when Congress wanted to limit the expression [heads of executive departments] specifically to Cabinet Officers, it did so in precise terms and added after 'heads of executive departments' the qualification 'who are members of the President's Cabinet.'" However, our examination of the cited Act and debates failed to reveal the use of either phrase in the Act or the legislative debates. On the contrary, from our examination, it appears that the Act and the debates on it explicitly and repeatedly distinguish between the heads of the executive departments, and the "persons next in rank to the heads of Departments." See Cong. Globe, 42d Cong., 3rd Sess. 2100–2105 (1873); Act of March 3, 1873, 17 Stat. 485, 486.

As his second basis for concluding that the "Seventh Floor Principals" may be authorized to receive home-to-work transportation, the State Department Legal Advisor construed subsection (b)(3) of section 1344 (which exempts "principal diplomatic and consular officials" from the restrictions on home-to-work transportation) to include the "*principal officers* of this [State] Department." [Italic supplied.] According to the Legal Advisor, the "principal officers" of the State Department are the Seventh Floor Principals. We do not concur in that construction of subsection 1344(b)(3). For similar reasons we also disagree with the DOD General Counsel who concluded in his 1953 opinion (as cited and relied upon by the State Department Legal Advisor) that the phrase "principal diplomatic and consular officials" includes "those principal *officers* of the Government whose duties require frequent official contact upon a diplomatic level with ranking officers and representatives of foreign governments." [Italic supplied.]

Although the Congress has not defined the term "principal diplomatic and consular officials" as used in section 1344, it has defined "principal officer" as that term is used in the context of performing diplomatic or consular duties. In 22 U.S.C. § 3902, it is provided that the term "principal officer" means "the officer in charge of a diplomatic mission, consular mission * * *, or other Foreign Service post." Consistent with that statute, the State Department's Foreign Affairs Manual also defines a "principal officer" to mean the person who "is in charge of an embassy, a legation, or other diplomatic mission, a consulate general or consulate of the United States, or a U.S. Interests Section." 2 F.A.M. § 041(i) (October 11, 1977). See also 3 F.A.M. 030 (Nov. 27, 1967) (similar definition of "principal officer"). Our reading of these statutory and regulatory definitions, in conjunction with the plain meaning of subsection (b)(3) of section 1344 leads us to conclude that neither the Legal Advisor's definition, nor that of the DOD General Counsel, is correct. In

our view the term "principal diplomatic and consular officials" only encompasses those individuals who are properly designated (or succeed) to head a foreign diplomatic, consular or other similar Foreign Service Post.

Furthermore, examination of the original enactment which was later codified as section 1344 by Pub. L. No. 97-258, 96 Stat. 877 (1982) also supports the conclusion that the Congress intended to limit the meaning of the phrase "principal diplomatic and consular officials" to the officers in charge of foreign posts. Section 16(a) (c) (2) of the Act of August 2, 1946, Chap. 744, 60 Stat. 810-811 provided, in pertinent part:

> The limitations of this paragraph [now contained in section 1344 (a)] shall not apply to any motor vehicles or aircraft for official use of the President, the heads of the executive departments enumerated in 5 U.S.C. 1, *ambassadors, ministers, charges d'affaires, and other principal diplomatic and consular officials.* [Italic supplied.]

As the underlined language makes clear, Congress intended the term "principal diplomatic and consular officials" to include ambassadors, ministers, charges d'affaires and other similar officials. The codification of title 31 was not intended to make any substantive changes in the law. *See* H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 69 (1982). *Compare also,* 2 F.A.M. §§ 041(i), 043 (October 11, 1977) (principal officers are ambassadors, ministers, charges d'affaires, and other similar officers who are in charge of Foreign Service Posts; each such person is the "principal diplomatic representative of the United States * * * to the government to which he is accredited"). Therefore, we conclude that the Seventh Floor Principals are not "principal diplomatic and consular officials" who may legally receive home-to-work transportation.

In arguing the third basis for his determination, the Legal Advisor relied specifically on our decision in 54 Comp. Gen. 855 (1975). That case concerned the provision of home-to-work transportation for DOD employees who were stationed in a foreign country where, according to the DOD submission, there was serious danger to the employees because of terrorist activities. As the Legal Advisor initially acknowledged, our decision in that case holds that where there is a "clear and present danger" to Government employees and the furnishing of home-to-work transportation in Government vehicles will afford protection not otherwise available, then the provision of such transportation is within the exercise of sound administrative discretion. 54 Comp. Gen. at 858.

The Legal Advisor then quotes the second passage from the decision (set forth earlier) which, as the reference indicates, was taken from 25 Comp. Gen. 844 (1946). That passage has been repeated a number of times as dicta in other Comptroller General decisions. (See, for example, B-181212, August 15, 1974, or B-178342, May 8, 1973.) Standing alone, it certainly implies that what constitutes official business is a determination that lies within the discretion of

the agency head, and it is not surprising that many agencies chose to act on that assumption. However, all decisions must be read in context. The seminal decision, 25 Comp. Gen. 844 (1946), denied a claim for cab fare between an employee's home and the garage where a Government car was stored, prior to beginning official travel, on the general principle that an employee must bear his own commuting expenses. The decision then said, in passing, that if an agency decided that it was more advantageous to the Government for official travel to start from an employee's home rather than from his place of business or, presumably, from the garage, "[S]uch use of a Government automobile is within the meaning of 'official purposes' as used in the act."

Deputy Assistant Attorney General Leon Ulman, Department of Justice, wrote a memorandum opinion on this topic for the Counsel to the President on August 27, 1979. After quoting the above-mentioned generalization about administrative discretion to authorize home-to-work transportation, Ulman concluded:

> But this sweeping language has been applied narrowly by both the Comptroller General and this Department * * *. We are aware of nothing that supports a broad application of the exception implied by the Comptroller General. That exception may be utilized only when there is no doubt that the transportation is necessary to further an official purpose of the Government. As we view it, only two truly exceptional situations exist: (1) where there is good cause to believe that the physical safety of the official requires his protection, and (2) where the Government temporarily would be deprived of essential services unless official transportation is provided to enable the officer to get to work. Both categories must be confined to unusual factual circumstances.

Moreover, even under the circumstances discussed in the terrorist activities case relied on by the State Department Legal Advisor, we pointed out that section 1344 does not expressly authorize either the exercise of such discretion or the provision of such transportation. We then stated:

> * * * the broad scope of the prohibition in [what is now section 1344], as well as the existence of specific statutory exceptions thereto, strongly suggests that specific legislative authority for such use of vehicles should be sought at the earliest possible time, and that the exercise of administrative discretion in the interim should be reserved for the most essential cases. 54 Comp. Gen. at 858 (footnote omitted).

Thus, it was the need to protect Government employees from a clear and present danger (not simply an administrative determination of the Government's interest) which led us to authorize the interim provision of home-to-work transportation until specific legislative authority for such transportation could be obtained.

Subsequent Comptroller General's decisions have not relied upon an administrative determination of the Government's interests as the sole basis for either approving or disapproving home-to-work transportation.[2] We have, however, somewhat broadened the con-

[2] An audit report which was primarily concerned with misuse of Federal employees as personal aides to Federal officials, GAO/FPCD-82-52 (B-207462, July 14, 1982) may have created a contrary impression. It, too, quoted our 1975 decision, without fully describing the limited context in which the exercise of administrative discretion might be permissible. The error was inadvertent.

cept of an emergency situation to include temporary bus service for essential employees during a public transportation strike. 54 Comp. Gen. 1066 (1975). *Cf.* 60 *id.* 420 (1981).

There is one other narrow exception to the prohibition which should be mentioned. When provision of home-to-work transportation to Government employees has been incident to otherwise authorized use of the vehicles involved, *i.e.,* was provided on a "space available" basis, and did not result in additional expense to the Government, we have raised no objection. See, *e.g.,* B-195073, November 21, 1979, in which additional employees were authorized to go home with an employee who was on field duty and therefore was exempt from the prohibition.

Unless one of these exceptions outlined above applies, agencies may not properly exercise administrative discretion to provide home-to-work transportation for their officers and employees, unless otherwise provided by statute. (See *e.g.* 10 U.S.C. § 2633 for an example of a statutory exemption for employees on military installations and war plants under specified circumstances.)

Conclusion

In light of the foregoing, we conclude that, unless one of the exceptions outlined above applies, the Deputy Secretary of State, the Under Secretaries, and the Counselor may not be authorized under 31 U.S.C. § 1344(b) to use Government vehicles or drivers for transportation between their homes and places of employment, nor may any other official or employee of the Departments of State and Defense (other than the Secretaries of those two Departments, and the Secretaries of the Army, Navy, and Air Force) be so authorized under that subsection, unless that person has been properly appointed (or has succeeded) to be the head of a foreign diplomatic, consular, or other Foreign Service post as an ambassador, minister, charge d'affaires, or another similar principal diplomatic or consular official.

[B-207694]

Compensation—Overtime—Early Reporting and Delayed Departure—Lunch Period, etc. Setoff

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. *Baylor* v. *United States,* 198 Ct. Cl. 331 (1972).

Compensation—Overtime—Fair Labor Standards Act—Early Reporting and/or Delayed Departure—Lunch Period, etc. Setoff—*Bona Fide* Break Requirement

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are *bona fide*—although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are *bona fide.*

Matter of: Edward L. Jackson, *et al.*—Setoff for Meal Periods Under Title 5 and Fair Labor Standards Act, June 9, 1983:

Mr. Donald C. Curran, Acting Deputy Librarian of Congress, requests a decision as to whether 81 former and current officers of the Library of Congress Special Police Force are entitled to overtime compensation for preshift and postshift duties under the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1976), and the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542 (1976).

Specifically, the issue for determination is whether the officers regularly have been afforded duty-free lunch breaks which would serve to offset allegedly compensable periods of preshift and postshift work. For the reasons stated below, we hold that lunch breaks provided the officers do not constitute compensable hours of work within the meaning of either overtime law, and, therefore, such breaks may offset compensable periods of preshift and postshift duty.

At the outset, the Library acknowledges that members of the Special Police Force are covered by FLSA. Generally, in cases involving claims for overtime compensation under FLSA, we request a report from the agency responsible for administering FLSA with respect to the affected Federal employees. See, for example, *Guards at Rocky Mountain Arsenal,* 60 Comp. Gen. 523 (1981). Under the provisions of 29 U.S.C. § 204(f), the Secretary of Labor is authorized to enter into an agreement with the Librarian of Congress for enforcement of FLSA with respect to employees of the Library. Section 10d.01 of the Department of Labor Field Operations Handbook (August 30, 1976) states that an agreement is now in effect which provides that the Library will investigate its employees' complaints under FLSA. Thus, the Library is placed in the dual position of defending its interests as an employing agency, and, at the same time, providing our Office with an objective statement of the facts and circumstances surrounding the officers' claims. We have held that we will not disturb the findings of fact issued by the agency responsible for administering FLSA with respect to the affected employees unless the findings are clearly erroneous; the burden of

proof lies with the party challenging the findings. *Paul Spurr,* 60 Comp. Gen. 354 (1981).

BACKGROUND

The claimants, represented by Officers Edward L. Jackson and Banks T. Johnson, are employed by the Library as uniformed guards and are required to work three 8-hour shifts, commencing at 7 a.m., 3 p.m., and 11 p.m. As the basis for their claims for overtime compensation under Title 5 and FLSA, they allege that they are required to report at least 15 minutes before their scheduled shifts to perform required preliminary activities, which include changing into uniform, receiving assignments, attending an informal roll call and inspection, and proceeding from the control room to their designated duty posts. Postshift activities allegedly constitute the reverse of the preshift routine, taking approximately the same amount of time to perform.

The administrative report sets forth findings of fact which conflict with the officers' allegations regarding the duties they are required to perform before and after their shifts, and the amount of time that is required to perform those duties. For example, the Library states that officers are not required to change into and out of their uniforms on Library premises, and that the average time spent performing preshift duties is 10 minutes. The Library, however, has chosen not to contest the officers' assertion that they perform 30 minutes of compensable preshift and postshift work per day. Rather, the Library contends that the officers have been provided duty-free lunch breaks which should offset periods of preshift and postshift work. The question, therefore, is whether the officers have been afforded duty-free meal periods which are not compensable hours of work and which would serve to offset periods of preliminary and postliminary duty.

The Library reports that members of the Special Police Force regularly are afforded a 30-minute lunch break, and, in this regard, refers to provisions of the collective bargaining agreement between the Library and the American Federation of State, County and Municipal Employees, Local 2477, the bargaining representative of the Special Police Force. Article XXI of the agreement, effective in 1981, provides as follows:

> During the daily tour of duty, insofar as possible, consistent with operational requirements, the employee will receive two rest breaks of twenty (20) minutes duration and a lunch period of thirty (30) minutes. The times of the rest breaks and lunch period are to be determined by the watch supervisor, so as to least interfere with building physical protection requirements. During the rest break and lunch period, the employee is officially on duty and subject to all, unless otherwise scheduled.

The Library states that officers are relieved from their posts of duty during lunch breaks, and that they are provided 10 minutes

in addition to the 30-minute lunch period to permit them to walk between their posts and the Library's dining facilities.

Further, the Library reports that, although officers are officially on duty and subject to call during their lunch breaks, interruptions of breaks have been "so infrequent as to be nonexistent." In support of this statement, the Library has submitted affidavits from six watch supervisors, stating that they "never" or "very rarely" have had to interrupt an officer's lunch period for an emergency or non-emergency incident, and, when such an interruption has occurred, the break has been rescheduled. The Library also has provided us with the results of a survey performed by its Buildings Management Division during the period October 17 to December 30, 1982, showing that eight of 7,500 lunch breaks scheduled during that period were interrupted; in each of the eight instances, the break was rescheduled. A separate survey conducted during the period January 1 to February 28, 1983, showed that five of the 13,500 lunches scheduled during that period were interrupted and consequently rescheduled.

LIBRARY OF CONGRESS POSITION

Based on the information it has furnished to us, the Library contends that lunch breaks provided the officers are substantially duty-free and therefore may be offset against compensable preshift and postshift work. In this regard, the Library cites portions of the Court of Claims' opinions in *Baylor* v. *United States*, 198 Ct. Cl. 331 (1972) and *Albright* v. *United States*, 161 Ct. Cl. 356 (1963), and our decisions in *Lorenzo G. Baca, et al.*, B-167602, August 4, 1976; B-179412, February 28, 1974; and 47 Comp. Gen. 311 (1967). Those cases express the general principle that lunch breaks during which an employee is restricted to the employment premises and subject to call may be offset against overtime which is compensable under 5 U.S.C. § 5542 if the employee is not required to perform substantial duty during the breaktime.

SPECIAL POLICE FORCE POSITION

The officers challenge the Library's finding that they have been afforded duty-free lunch breaks, contending that, during the period of the Library's survey, the agency took "special care" not to recall an officer during his lunch break and to reschedule any breaks which were interrupted. In support of their position that, contrary to the Library's finding, they have been required to perform substantial duty during lunch breaks, the officers have submitted sworn statements to the effect that they "occasionally" have been called back from breaks to respond to emergency and non-emergency incidents. In this regard, they have furnished us with copies of Library of Congress incident reports for 1982, indicating that the

Special Police Force handled 28 emergency incidents and 16 borderline emergency incidents during that year, together with the District of Columbia Fire Department's listing of fire alarms reported by the Library in 1982. Additional documentation submitted by the officers includes: (1) a memorandum issued by the Captain of the Special Police Force instructing officers to remain on Library premises during their lunch periods; (2) a memorandum from the Head of the Protective Services Section directing officers to respond to incidents, including those involving disorderly conduct, which are brought to their attention during lunch breaks; and (3) the report of a grievance filed by an officer who was required to respond to a non-emergency incident during his lunch break.

The officers further argue that regulations in the Library of Congress Handbook for Special Police pertaining to lunch breaks are substantially similar to regulations which the Court of Claims in *Baylor* v. *United States,* cited above, construed as failing to prescribe a duty-free lunch period. Section 42 of the Handbook provides as follows:

> LUNCH PERIODS. An officer works a straight 8-hour tour of duty. He is authorized to eat his lunch during his tour of duty for a period not in excess of 30 minutes at a time to be determined by his supervisor. Lunch periods will be scheduled so as to least interfere with building protection requirements. During the lunch break, the officer is officially on duty and subject to call.

In addition to the Court of Claims decision in *Baylor*, the officers rely generally on *Albright* v. *United States*, cited above, and our decisions in *John L. Svercek*, 62 Comp. Gen. 58 (1982), and B-56940, May 1, 1946, sustained in 44 Comp. Gen. 195 (1964).

Finally, the officers contend that Library of Congress Regulation 2014-7 supports their position that lunch breaks may not be offset against compensable preshift and postshift work. That regulation provides that "[r]est periods will not be considered as leave, and they are not to be accumulated, used to extend the luncheon period or to offset tardiness or early departure from work."

OPINION

"Title 5" overtime under 5 U.S.C. § 5542 at one and one-half times the basic rate of compensation is payable to Federal employees whose authorized or approved hours of work exceed 40 hours in an administrative workweek or 8 hours in a day. It is payable only if ordered or approved in writing or affirmatively induced by an official having authority to do so. *Guards at Rocky Mountain Arsenal*, cited above.

On May 1, 1974, the Fair Labor Standards Act Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA coverage to Federal employees. The FLSA requires payment of overtime compensation to nonexempt employees for hours worked in excess of 40 hours per week. 29 U.S.C. § 207 (1976).

An employee who meets the requirements for both Title 5 and FLSA overtime is entitled to overtime compensation under whichever one of the laws provides the greater benefit. 54 Comp. Gen. 371 (1974). Since we are unable to ascertain from the record which computation would be more beneficial to the officers, the question whether their lunch breaks are subject to offset will be addressed under both Title 5 and FLSA standards.

SETOFF FOR LUNCH BREAKS UNDER TITLE 5

The standards for determining whether a lunch break is subject to offset under Title 5 are discussed extensively in *Baylor*, cited above, wherein the Court of Claims addressed the question whether the General Services Administration (GSA) afforded its uniformed guards a duty-free lunch break which would offset compensable preshift and postshift work. As indicated by the officers, the court in *Baylor* stated that provisions of the GSA Handbook for Building Guards, requiring guards to remain on duty and subject to call during lunch periods, did not "prescribe" a duty-free lunch break. Nevertheless, the court applied the following standard to determine whether, in actual practice, guards were provided a duty-free break:

> * * * [w]hen the employer makes lunch break time available, and the employee actually takes advantage of such privilege, such time may offset otherwise compensable preshift or postshift hours of work. This is true even when such breaktime is not regularly scheduled so long as it is regularly taken; and it applies when the employee is nevertheless subject to emergency call unless he has shown that responding to such calls substantially reduced his duty free time.
>
> Where applicable, such away-from-post lunch breaks will offset an equal amount of compensable overtime. Such offset will operate only in cases where the employee was actually permitted to leave his post for his lunch break.* * * 198 Ct. Cl. 331, 365.

Applying the above-quoted standards, we have consistently held that the mere fact that an employee is on call and not permitted to leave the employment premises will not defeat a setoff for lunch breaks unless the employee demonstrates that his breaktime was substantially reduced by responding to calls. *Frank E. McGuffin*, B-198387, June 10, 1980; *Raymond A. Allen*, B-188687, September 21, 1977.

The officers have not demonstrated under the *Baylor* standards that they have been restricted to the extent that they lacked duty-free meal breaks. Although the collective bargaining agreement and regulations in the Special Police Handbook require officers to remain on duty and subject to call during lunch breaks, the Library states, and the officers do not dispute, that they regularly have been relieved from their posts during breaktime and are free to eat lunch elsewhere on Library premises.

While the officers challenge the Library's finding that lunch breaks have been interrupted infrequently, they have not produced evidence to support a contrary determination. Specifically, the offi-

cers' sworn statements to the effect that they "occasionally" have been interrupted during lunch breaks are general in nature, and do not indicate the number of times that officers were required to work during meal periods. Furthermore, although the Library's incident reports and the District of Columbia Fire Department's listing of fire alarms show the dates of various emergency and non-emergency incidents, there is nothing to indicate that any of the incidents occurred during an officer's meal period. In fact, the Library has advised us that most of the incidents reported by the Library were handled routinely by patrol units. Finally, while the report of a grievance filed by an officer and a memorandum issued by a supervisor of the Special Police Force refer to several specific instances in which an officer has been expected to respond to a non-emergency incident, they do not provide any indication of the frequency with which such incidents have caused officers' lunch breaks to be interrupted.

Under these circumstances, we have no basis for questioning the Library's determination that lunch breaks afforded the officers are substantially duty-free. Accordingly, we hold that the lunch breaks may be offset against periods of preshift and postshift work which would be compensable under 5 U.S.C. § 5542.

The Court of Claims' decision in *Albright* v. *United States,* cited above, and our decision in B-56940, May 1, 1946, sustained in 44 Comp. Gen. 195, relied upon by the officers, involve facts which are substantially different from those presented by the officers' claims. In *Albright,* the court found that civilian guards employed by the Department of the Navy did not have duty-free lunch periods since no definite time for meals was provided, and, when lunch breaks were allowed, the guards generally were restricted to their assigned posts. See 161 Ct. Cl. 356 at pages 361-362, and 368-369. In our decision B-56940, above, we concurred with the determination of the Bureau of Engraving and Printing that, in view of the unique conditions to which employees of the Bureau were subjected, the lunch periods of all of its employees (including guards), which for many years had been regarded administratively as duty time, properly could continue to be considered as work time. That decision was not intended to constitute authority for treating lunch periods as duty or work time for other guards employed by the Government solely because of the fact that the guards—or other employees—are required to remain in the building and subject to call. See 47 Comp. Gen. 311, cited above.

The officers additionally contend that Library of Congress Regulation 2014-7, pertaining to rest breaks, supports their position that lunch breaks are not offsetable. We find that the cited regulation has no bearing on the question before us since it refers only to rest periods, and the Library has not claimed an offset against such breaktime.

SETOFF FOR LUNCH BREAKS UNDER FLSA

The standards for determining whether a lunch break is *bona fide* and thus subject to offset against preshift and postshift work otherwise compensable as FLSA overtime are essentially the same as the Title 5 standards delineated in *Baylor,* above. See *Guards at Otis Air Force Base,* B-198065, October 6, 1981. The courts have held that, under FLSA, the essential consideration as to whether a meal period is *bona fide* is whether the employee is in fact completely relieved from work for the purpose of eating regularly scheduled meals. *Blain* v. *General Electric Co.,* 371 F. Supp. 857 (W. D. Ky. 1971). Explaining this criterion, instructions contained in Federal Personnel Manual Letter 551-1, May 15, 1974, Attachment 4, para. C, state in relevant part:

> Bona fide meal periods are not considered as "hours worked." The employee must be completely relieved from duty for the purpose of eating regular meals. When an employee's meal periods are uninterrupted except for rare and infrequent emergency calls, the meal periods can be excluded from working time. On the other hand, if the meal periods are frequently interrupted by calls to duty, the employee would not be considered relieved of all duties and all the meal periods must be counted as "hours worked." If an employee is completely freed from duties during his meal periods it is not necessary that he be permitted to leave the premises for the time to be excluded from work time.

With regard to the standard of proof necessary to substantiate a claim under FLSA, the Act requires employers to "make, keep, and preserve such records of persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." See 29 U.S.C. § 211(c). On this basis, our decisions impose a special burden of proof on Federal agencies. See *Jon Clifford, et al.,* B-208268, November 16, 1982. Initially, however, the employee must prove that he has performed work for which overtime compensation is payable with sufficient evidence to show the amount and extent of the work as a matter of just and reasonable inference. *Guards at Rocky Mountain Arsenal,* cited above. At that point, the burden of proof shifts to the employing agency to show the exact amount of overtime worked or to rebut the employee's evidence. *Civilian Nurses,* 61 Comp. Gen. 174 (1981). Accordingly, the employing agency does not have the burden of proving that a meal period is *bona fide* and thus excludable from "hours worked" within the meaning of FLSA unless the employee provides some evidence of the amount and extent of work performed during breaktime.

Since, in this case, the employing agency is also the agency responsible for objectively reporting the facts surrounding the FLSA claims, a more stringent standard of proof must be applied to evidence submitted by the officers. That is, the officers not only must present evidence of the amount and extent of work performed during breaktime, but must establish by such evidence that the Library's findings of fact are clearly erroneous. *Paul Spurr,* above.

As noted previously, the officers do not dispute that they regularly have been relieved from their posts of duty during lunch breaks and are free to eat lunch elsewhere on Library premises. Although they challenge the Library's finding that lunch breaks have been interrupted infrequently, the officers have not produced evidence indicating the number of times that they have been required to work during meal periods, or that any record was made thereof. Since the officers have not shown that their lunch breaks were interrupted on other than an infrequent basis, we have no reason to question the Library's findings that such breaks are substantially duty-free. Accordingly, we hold that the breaks are *bona fide* and may be offset against periods of preshift and postshift activity which otherwise would be compensable under FLSA.

Our decision in *John L. Svercek,* above, relied upon by the officers, does not provide a basis for any different determination by us. In that case, we addressed the question whether, under FLSA, lunch breaks afforded the Federal Aviation Administration (FAA) Air Traffic Control Specialists were *bona fide* and therefore subject to offset against compensable preshift work. Our determination that the employees did not have *bona fide* lunch breaks was based on findings issued by the Office of Personnel Management (OPM), the agency authorized to administer FLSA with respect to individuals employed by FAA.

The officers imply that the findings upon which our decision in *Svercek* was based were those set forth in a compliance order issued by OPM to FAA. The order, quoted in *Svercek,* included OPM's conclusion that lunch breaks afforded the FAA employees were not *bona fide* because the breaks did not have a fixed length, "and since the employees remained subject to recall." While we accepted OPM's conclusion that the lunch breaks were not *bona fide,* our determination was not based solely on the fact that the employees were on call during breaktime. Instead, our decision to disallow a setoff for lunch breaks was grounded on OPM's further explanation that the employees either could not leave their work sites for lunch or that they were frequently interrupted if they did leave their work sites.

Thus, the facts presented by the officers' claims clearly are distinguishable from those basing our determination in *Svercek.* As noted above, the officers do not dispute that they are relieved from their post during lunch breaks, and they have not shown that interruption of breaks occurred on other than an infrequent basis.

For the reasons stated, we hold that lunch breaks provided the officers may be offset against periods of preshift and postshift work which allegedly would be compensable under the overtime provisions of Title 5 and FLSA.

[B-209945]

Officers and Employees—Transfers—Real Estate Expenses—Finance Charges—Reimbursement Prohibition—Veterans Administration Funding Fee

The Veterans Administration (VA) questions whether the VA funding fee, consisting of one-half of 1 percent of the amount of a loan guaranteed or insured by the VA, required under the Omnibus Budget Reconciliation Act of 1982, is reimbursable under para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended. We hold that the funding fee is not reimbursable under FTR para. 2-6.2d because the fee constitutes a finance charge under Regulation Z (12 C.F.R. 226.4 (1982)).

Matter of: Veterans Administration—Relocation Expenses—Reimbursement of VA Funding Fee, June 9, 1983:

Conrad R. Hoffman, Assistant Deputy Administrator for Budget and Finance, Veterans Administration (VA), requests a decision as to whether a VA funding fee is reimbursable as a fee or charge that is similar to a loan origination fee within the purview of para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended (Supp. 4, October 1, 1982).

We hold that FTR para. 2-6.2d does not authorize reimbursement of the VA funding fee since the fee constitutes a finance charge within the meaning of Regulation Z, 12 C.F.R. § 226.4(a) (1982).

Section 1829 of Title 38, United States Code, added by the Omnibus Budget Reconciliation Act of 1982, Public Law 97-253, 96 Stat. 805 (1982), provides that a "loan fee" in the amount of one-half of 1 percent of a housing loan made, guaranteed, or insured by the VA must be collected from the veteran purchaser and remitted to the Administrator of the VA as a condition precedent to the VA making, guaranteeing, or insuring a loan. The fee is a user charge which is deposited into the U.S. Treasury as miscellaneous receipts.

The "loan fee" or "funding fee" is not the same as the VA fee for loan application. It is imposed in addition to a loan origination fee, which is a fee payable by the borrower to the lending institution and is limited by the VA to an amount not to exceed 1 percent of the amount of the loan. 38 C.F.R. § 36.4312(d)(2) (1982). The loan origination fee compensates the lender for expenses incurred in originating the loan, preparing documents, and related work.

Prior to the October 1982 revision of the FTR, loan origination fees assessed on a percentage rate basis for the purpose of defraying a lender's administrative expenses were not reimbursable. Specifically, FTR para. 2-6.2d prohibited reimbursement of expenses incurred in connection with the sale or purchase of a house whenever the expenses were determined to constitute a finance charge within the meaning of the Truth in Lending Act, Title I, Public Law 90-321, 82 Stat. 146 (1968) (15 U.S.C. 1601 note), as implemented by Regulation Z, 12 C.F.R. § 226.4. Since Regulation Z expressly

categorizes service charges and loan fees as finance charges when they are imposed incident to or as a condition of the extension of credit, we consistently interpreted the provisions of FTR para. 2-6.2d as precluding reimbursement of loan origination fees. See, for example, *Stanley Keer,* B-203630, March 9, 1982.

However, the revised provisions of FTR para. 2-6.2d, effective October 1, 1982, specifically authorize reimbursement of loan origination fees and similar charges, providing in pertinent part as follows:

d. *Miscellaneous expenses.*

(1) *Reimbursable items.* The expenses listed below are reimbursable in connection with the sale and/or purchase of a residence, provided they are customarily paid by the seller of a residence in the locality of the old official station or by the purchaser of a residence at the new official station to the extent they do not exceed amounts customarily paid in the locality of the residence.

(a) FHA or VA fee for loan application;
(b) Loan origination fee;
(c) Cost of preparing credit reports;
(d) Mortgage and transfer taxes;
(e) State revenue stamps;
(f) *Other fees and charges similar in nature to those listed above, unless specifically prohibited in (2), below;*

* * * * * * *

(2) *Nonreimbursable items.* Except as otherwise provided in (1), above, the following items of expense are not reimbursable:

* * * * * * *

(e) *No fee, cost, charge, or expense determined to be part of the finance charge under the Truth in Lending Act, Title I, Pub. L. 90-321, and Regulation Z issued in accordance with Pub. L. 90-321 by the Board of Governors of the Federal Reserve System, unless specifically authorized in (1), above;* * * * [Italic supplied.]

The VA funding fee may be considered similar to a loan origination fee which has been made reimbursable under the 1982 amendment to the FTR. Nevertheless, under the above-quoted FTR provisions, those fees and charges which are regarded as similar to the expenses for which reimbursement is specifically authorized in FTR para. 2-6.2d(1) may be reimbursed only if such expenses do not constitute a finance charge within the contemplation of the Truth in Lending Act, as implemented by Regulation Z. Accordingly, in determining whether or not an item of real estate expense not specifically listed in FTR para. 2-6.2d(1) is reimbursable under that provision as a similar fee or charge, the item must be examined in light of Regulation Z and decisions of this Office.

The relevant part of Regulation Z, 12 C.F.R. Part 226, states:

226.4 *Determination of finance charge.* (a) *General rule.* Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:

* * * * * * *

(7) Premium or other charge for any other guarantee or insurance protecting the creditor against the customer's default or any other credit loss.

Applying these provisions, we held that a prior VA funding fee imposed by the Veterans' Readjustment Benefits Act of 1966, 38 U.S.C. § 1818(d) (repealed in 1970), was not reimbursable under section 4.2d of Office of Management and Budget Circular A-56 (June 1969), a predecessor to FTR para. 2-6.2d. 49 Comp. Gen. 483 (1970). Specifically, we determined that the prior funding fee constituted a finance charge since, like the current funding fee, it is paid by the veteran purchaser incident to and as a condition precedent to his obtaining from the creditor a loan that is guaranteed by the VA. Further, the fee was not specifically excluded from the definition of a finance charge by 12 C.F.R. § 226.4(e).

The VA funding fee imposed by the Omnibus Budget Reconciliation Act of 1982 is substantially similar to the prior funding fee discussed in 49 Comp. Gen. 483, above, and the fee is not excluded from the definition of a finance charge by the current provisions of 12 C.F.R. § 226.4(e). Based on the rationale stated in our earlier decision, the VA funding fee constitutes a finance charge within the meaning of Regulation Z, since it would only be imposed in connection with the extension of credit, as opposed to a charge imposed for services rendered without regard to whether credit is sought or obtained. See *Donald W. Espeland*, B-186583, March 30, 1978. Therefore, reimbursement of the fee is specifically prohibited by FTR para. 2-6.2d, regardless of whether the fee may be considered similar to a loan origination fee or any of the other expenses authorized by FTR para. 2-6.2d(1).

Accordingly, we hold that under FTR para. 2-6.2d, the VA funding fee constitutes a nonreimbursable item of real estate expenses.

[B-210407]

Contracts—Protests—Interested Party Requirement—Small Business Set-Asides

Protester rejected as other than small business under 100-percent small business set-aside procurement contending it was improperly rejected is interested party under General Accounting Office Bid Protest Procedures because if protest is sustained the protester would be eligible for award.

Contracts—Small Business Concerns—Awards—Set-Asides—Qualifications of Small Businesses—Business Entity Organized for Profit Requirement

To qualify as a small business concern a concern must be a business entity organized for profit. The contracting officer acted reasonably in rejecting bid in which bidder represents that it is a nonprofit organization, thus indicating that bidder is other than a small business concern and ineligible for award under a small business set-aside.

Bids—Invitation For Bids—Defective—Evaluation Criteria—Evaluation Mainly Based on Factors Other Than Price

An invitation for bids which states that in the evaluation for award the bidders' "technical submittals" will be weighted at 80 percent and cost 20 percent is improper because award under this evaluation scheme could be made to a bidder other than the one which bid the lowest price. A formally advertised contract must be awarded on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder is responsible.

Matter of: Institute for Aerobics Research, June 9, 1983:

The Institute for Aerobics Research protests the rejection of its bid under invitation for bids No. DABT15-83-B-0001, a 100-percent small business set-aside, issued by the Department of the Army for developing and presenting physical fitness classes at Ft. Benjamin Harrison, Indiana. Aerobics contends that the Army erroneously determined it to be other than a small business concern and followed improper procedures in making this determination.

We deny the protest.

This procurement was for a "pilot course of instruction on Physical Fitness and Wellness Systems and their impact on soldier lifestyle." The contractor was to develop and deliver all the course materials necessary for 20- and 80-hour basic programs of instruction and an 80-hour advanced program of instruction, as well as present these programs of instruction to personnel at Ft. Benjamin Harrison. The training program, including all supplemental training aids, lesson plans, programs of instruction, course outlines, tests and handouts would then become the property of the Government, whose employees presumably would conduct any subsequent courses.

A public bid opening was held on December 3, 1982. The Army's Abstract of Bids shows the following bids were received:

Bidder	Size status	Amount
Chicago State University	"Non-profit"	$53,348
Institute of Human Performance (awardee)	Small	73,195
Walter G. Moore & Sons	Small	75,000
Institute for Aerobics Research (protester)	"Non-profit"	90,910

The protester's bid included Standard Form 33, in paragraph 1 of which the protester represented that it is a small business concern and in paragraph 5 of which it represented that it is "a nonprofit organization." The Army regarded these two representations as inconsistent. The Army consequently telephoned the firm, explaining its concern over these representations, and asked Aerobics for "clarification." Aerobics responded that it is a nonprofit organiza-

tion. The Army then telephoned a regional office of the Small Business Administration (SBA) about Aerobics' bid and was advised that a nonprofit organization is not eligible to receive award under a small business set-aside procurement. The Army subsequently made award to the Institute of Human Performance, whose bid was described by the Army in its report to our Office as "the lowest * * * received from a small business concern."

Upon being notified of the award to the Institute of Human Performance, Aerobics protested to our Office, objecting to the Army's rejection of its bid. For the reasons stated below, we deny Aerobics' protest. In addition, however, although Aerobics did not object to the procedures used by the Army for evaluating bids, we find these procedures to be inappropriate. We discuss the deficiencies in those procedures below also.

As a preliminary matter, the Army contends that since Aerobics is a nonprofit organization, Aerobics does not qualify as a small business concern and therefore is not an interested party capable of pursuing this protest. *See* 4 C.F.R. § 21.1(a) (1983). Our Office has held that where an other than small business protests that the procuring agency followed improper procurement procedures in a small business set-aside, the protester is not an interested party, because if our Office determines that the challenged procedures are improper and sustains the protest, the protester would still be ineligible for award. See *Central Texas College,* B-209626, January 17, 1983, 83-1 CPD 49. However, where a bidder for a small business set-aside procurement protests that it was improperly determined to be an other than small business after bid opening and would otherwise be eligible for award of the contract in question, as is the case here, it clearly has a direct interest in the outcome of the protest. Therefore, we will consider the protest.

Aerobics' principal contention is that since it represented itself as a small business concern in its bid, the Army could not reject it as an other than small business without referring any question of the firm's small business status to the SBA for a size determination. *See* Defense Acquisition Regulation (DAR) § 1-703(b). It also argues that it is in fact a small business concern eligible for award under this procurement, even though it is a nonprofit organization. It reasons that since the SBA's regulations provide that an entity organized for profit owned by a nonprofit entity qualifies as a small business concern, the SBA could not have intended to preclude a nonprofit entity from receiving a small business set-aside contract since it would only be a matter of "form" for a nonprofit entity to create a for-profit subsidiary. *See* 13 C.F.R. § 121.3-2(i) (1982). It adds that since the solicitation treated small business status and type of business organization in separate questions, the answers to these questions are not mutually exclusive.

"Small business concern" is defined by DAR § 1-701.1(a)(1), which states that "concern" means any business entity organized

for profit. The SBA regulations define "concern" in the same manner and add that this includes a "for profit" entity even if it is owned by a nonprofit entity. 13 C.F.R. § 121-3.2(i). Aerobics correctly represented in its bid that it is a nonprofit organization. By making such a representation, Aerobics indicated on the face of its bid that it is other than a small business concern and thus ineligible for award under this small business set-aside. We therefore believe the contracting officer acted reasonably in rejecting Aerobics' bid. We cannot accept Aerobics' rationale that the SBA must not have intended to disqualify nonprofit entities from the award of small business set-asides in the the face of clear and unambiguous language to the contrary in SBA's regulations.

The protest is denied.

We note, however, that this procurement was deficient in that the solicitation set out a method for evaluating bids which was inappropriate for a formally advertised invitation for bids. There are references throughout this solicitation which identify it as an invitation for bids and those who respond to it as "bidders," and there was a public bid opening. The award of a formally advertised contract must be made on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder responsible. 10 U.S.C. § 2305(c); *Emerson Electric Company, Environmental Products Division,* B-209272, November 4, 1982, 82-2 CPD 409.

Most of the solicitation does not conflict with the requirements for award for a formally advertised contract. Sections L and M, however, required bidders to submit "proposals" and provided that the contract would be awarded based on an evaluation of both the technical submittal and of "cost," in which the technical score would be weighted at 80 percent and "cost" at 20 percent. These provisions are inappropriate to a formally advertised procurement because they establish an evaluation scheme under which cost becomes secondary to the quality of a bidder's "technical submittal" and the qualifications of its employees. This kind of evaluation is appropriate only in a negotiated contract, which the record suggests may have been more suitable for the kind of services the Army was seeking here. As it was, the solicitation was a checkerboard of "formal advertising" and "negotiation" provisions.

These evaluation provisions explain something which the Army did not address in its report to our Office: why it gave first consideration for award to the highest bidder. Aerobics is of the "belief" that its technical submittal received the highest rating. Since the solicitation stated that the technical evaluation would be weighted at 80 percent in determining the award, Aerobics contends that it should have received the contract.

It may be, as Aerobics asserts, that if eligible it would have been first in line for award according to the solicitation's evaluation criteria. Those criteria, however, cannot be used under the method of

procurement—formal advertising—which the Army chose here. Aerobic's protest was not filed until after award; had we been in a position to review this procurement earlier, we would have recommended that IFB -0001 be canceled and the procurement resolicited with evaluation provisions appropriate to the method of procurement used. Even if Aerobics had not been rejected on the basis of its size status, therefore, we would not have concluded that it should receive the award of this contract.

Since the contract has been completely performed, it is not feasible to recommend any corrective action. However, we are advising the Secretary of the Army of the deficiencies noted.

[B-210767]

Public Health Service—Commissioned Personnel—Separation—Subsequent Appointment To Civilian Position—Relocation Expense Reimbursement and Allowances

A Commissioned Officer in the Public Health Service (PHS) was separated from the officer corps and recruited to fill a manpower shortage position in the Veterans Administration. Employee seeks reimbursement of real estate expenses occasioned by sale of his old residence in Maryland and purchase of new residence in California. Reimbursement is denied because as a commissioned officer in the PHS, employee was a member of a uniformed service whose pay and allowances are prescribed by Title 37 of U.S. Code, which does not provide for such reimbursement. Consequently, claimant was not embraced by reimbursement provisions of sections 5721-5733 of Title 5, applicable to civilian employees of Government only. Thus, purported transfer was a separation from uniformed service followed by subsequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees.

Matter of: Dr. Albert B. Deisseroth—Reimbursement of Real Estate Expenses—Public Health Service Officer, June 9, 1983:

This responds to a request for decision submitted by the Assistant Deputy Administrator for Budget and Finance, Office of Budget and Finance, Veterans Administration (VA), concerning a claim for reimbursement of real estate expenses for Dr. Albert B. Deisseroth under the provisions of 5 U.S.C. § 5724a(a)(4).

The issue presented is whether a Commissioned Officer of the Public Health Service (PHS) is entitled to reimbursement of real estate expenses after separation from service and subsequent to reemployment with the VA. For the reasons stated below, we find no statutory authority which would allow for such reimbursement.

Dr. Albert B. Deisseroth had served on active duty in the Commissioned Corps of the PHS, and was stationed at the National Institutes of Health in Bethesda, Maryland. On June 28, 1981, Dr. Deisseroth began work as the Chief of the Hematology/Oncology Section of the VA Medical Center in San Francisco. He states that he was recruited by the VA to fill "an existing void" at the Center. The VA has confirmed that Dr. Deisseroth's appointment was to a manpower shortage position. According to the PHS, Dr. Deisseroth's last day on active duty was June 30, 1981, and he was sepa-

rated on July 1, 1981. On March 30, 1982, Dr. Deisseroth applied for reimbursement of $9,736.50 in real estate expenses occasioned by the sale of his former residence in Potomac, Maryland, and the purchase of his new home in Novato, California.

The authorizing official at the VA Medical Center authorized miscellaneous expenses, travel and transportation for Dr. Deisseroth, his wife and three children, shipment of household goods, and real estate expenses.

The matter has come before us because of a disagreement between personnel within the VA as to whether or not Dr. Deisseroth is entitled to reimbursement. The Assistant General Counsel of the VA has concluded that Dr. Deisseroth is an employee "transferred" from one agency to another—a position not shared by the Assistant Deputy Administrator for Budget and Finance who has submitted this request for decision.

Specifically, the Assistant General Counsel has urged that our holdings in 46 Comp. Gen. 628 (1967) and 47 *id.* 763 (1968) are applicable to Dr. Deisseroth's situation, and therefore as a "transferred" employee without a break in service, he is entitled to reimbursement of real estate expenses pursuant to 5 U.S.C. § 5724a(a)(4). However, those holdings are not applicable in the instant case, for both decisions pertained to overseas *civilian* employees transferred to agencies within the United States.

This Office has held that Commissioned Officers of the PHS are to be considered as members of a uniformed service. 45 Comp. Gen. 680 (1966); B-201706, March 17, 1981. Dr. Deisseroth, as an officer in the Commissioned Corps of the PHS, was consequently a member of a uniformed service at the time of his separation in June 1981. Therefore, he was not embraced by the travel and relocation reimbursement authority of 5 U.S.C. § 5721-5733, which is applicable to civilian employees of the Government only. As a member of a uniformed service, claimant's pay and allowances were prescribed by Title 37 of the United States Code, and that title does not provide for reimbursement of real estate expenses. Further, section 101(3) of that title specifically includes the PHS as a "uniformed service." In addition, paragraph 2-1.2(b)(3) of the Federal Travel Regulations, FPMR 101-7 (May 1973 (FTR)), issued pursuant to 5 U.S.C. §§ 5721-5733, *supra,* specifically excludes from coverage all persons whose pay and allowances are prescribed by Title 37.

An examination of the legislative history of Title 5 reveals that it codifies, *without substantive change,* various laws relating to travel and relocation expenses of *civilian* employees of the Government. For example, Title 5 codifies the Administrative Expenses Act of 1946, Pub. L. 79-600, 60 Stat. 806, which prescribed travel reimbursement regulations for "any civilian officer and employee of the Government." The qualifying adjective "civilian" is found in the 1952, 1958 and 1964 editions of the Code. In 1966, Congress en-

acted Pub. L. 90-83, 81 Stat. 195, which amended Title 5 and added the section pertaining to relocation expenses, 5 U.S.C. § 5724a(a). Section 5721 of the amended title defined "employee" as an "individual employed in or under an agency." Although the adjective "civilian" no longer preceded "employee," nothing in the legislative history indicates a Congressional intent that this deletion was to serve as a substantive change in the law so as to include members of the uniformed services as "employees." In fact, Senate Report No. 482 which accompanied the legislation, although referring to the definition of "agency" under the Back Pay Act, 5 U.S.C. § 5596, stated that: "The definition in subsection (a)(2) continues the application of the section to only civilian officers and employees, and does not encompass members of the uniformed services as they are not 'employed' in or under an agency." See 1967 U.S. Code Cong. & Ad. News, p. 1549.

Therefore, at the time of his move from the PHS to the VA, Dr. Deisseroth was not covered by the real estate expenses reimbursement authority of 5 U.S.C. § 5724a(a)(4) since he was not a civilian employee. Also, Title 37 contains no analogous provision which would allow for such reimbursement. Therefore, we must regard Dr. Deisseroth's purported "transfer" to have been a separation from a uniformed service followed by a subsequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees. See B-164854, August 1, 1968; *cf. Stephen E. Goldberg,* B-197495, March 18, 1980.

Accordingly, as no statutory authority exists to reimburse the claimant for real estate expenses under either Title 5 or Title 37, his claim for such must be denied.

We also note that the VA has allowed Dr. Deisseroth travel and transportation expenses. This would be a proper reimbursement to Dr. Deisseroth only under either 5 U.S.C. § 5723, as a new employee in a manpower shortage position, or under 37 U.S.C. § 404(a)(3) as a separated member of a uniformed service upon return to his home of record. We were informed that Dr. Deisseroth was a manpower shortage appointee. However, reimbursement under such authority is limited. Thus, residence sale and purchase expenses, miscellaneous expense allowance, and per diem for family are not allowable. See FTR paragraph 2-1.5f(4); 54 Comp. Gen. 747 (1975). Therefore, any amounts erroneously paid to Dr. Deisseroth beyond the scope of this authority will have to be repaid by him. See *Dr. Frank A. Peak,* 60 Comp. Gen. 71 (1980).

[B-206237]

Attorneys—Fees—Civil Service Reform Act of 1978—Payment in the Interest of Justice

Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-

filed application for disability retirement. *David G. Reyes,* B-206237, August 16, 1982. Claim for reasonable attorney fees under the Back Pay Act, 5 U.S.C. 5596, as amended, is allowable since General Accounting Office, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 C.F.R. 550.806.

Attorneys—Fees—Civil Service Reform Act of 1978—Reasonableness of Fees Claimed

Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality.

Matter of: Shelby W. Hollin—Claim for Attorney Fees Under the Back Pay Act, June 10, 1983:

The issue in this decision concerns a claim for attorney fees for representation of a Federal employee whose claim for backpay and restoration of leave we allowed in a prior decision. We hold that reasonable attorney fees may be paid under the Back Pay Act, 5 U.S.C. § 5596, and implementing regulations since payment is warranted in the interest of justice.

Mr. Shelby W. Hollin claims attorney fees in the amount of $2,900 in connection with his representation of David G. Reyes, the subject of our decision *David G. Reyes,* B-206237, August 16, 1982. In *Reyes,* we held that, although the Department of the Army could place the employee on involuntary leave while the agency filed for his disability retirement since the agency's determination was based on a medical opinion that the employee was incapacitated for duty, the Army was obligated to either restore Mr. Reyes to active duty or to take steps to separate him on grounds of disability after the Office of Personnel Management (OPM) denied the application for disability retirement. We concluded that the Army's failure to restore Mr. Reyes to active duty or to take steps to separate him on grounds of disability constituted an unjustified or unwarranted personnel action under 5 U.S.C. § 5596 (1976). Accordingly, we granted Mr. Reyes' claim for backpay and restoration of leave for the period March 27, 1980, to May 8, 1980. Following our decision, Mr. Hollin filed a claim for attorney fees in the amount of $2,900.

The authority for the payment of attorney fees is contained in the Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of 1978. Under the amended Act, reasonable attorney fees may be paid to employees found to have been affected by unjustified or unwarranted personnel actions. See 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979). Final regulations implementing the amended Back Pay Act were issued by the Office of Personnel Management, 46 Fed. Reg. 58271, December 1, 1981, and appear in 5 C.F.R. Part 550, Subpart H. Section 550.806(a) of 5 C.F.R. provides as follows:

An employee or an employee's personal representative may request payment of reasonable attorney fees related to an unjustified or unwarranted personnel action

that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. Such a request may be presented only to the appropriate authority that corrected or directed the correction of the unwarranted personnel action * * *.

The fact that Mr. Reyes incurred attorney fees pursuant to an attorney-client relationship is supported by an affidavit provided in the request. The statement of services provided to Mr. Reyes are all related to defending Mr. Reyes against the actions of the Army which, in part, resulted in our finding of an unjustified or unwarranted personnel action. Finally, since this Office rendered the decision granting part of Mr. Reyes' claim for backpay and restoration of leave, we are "the appropriate authority that * * * directed the correction of the unjustified or unwarranted personnel action * * *." Therefore, the request for attorney fees is properly presented to this Office.

Section 550.806(b) of title 5, C.F.R., provides that:

(b) The appropriate authority to which such a request is presented shall provide an opportunity for the employing agency to respond to a request for payment of reasonable attorney fees.

We forwarded Mr. Hollin's claim for attorney fees to the Director of Civilian Personnel, Department of the Army. By letter of October 26, 1982, the Office of the Judge Advocate General, Department of the Army, responded and stated, in part:

We have reviewed the file and interpose no legal objection to the payment of reasonable attorney fees. Based on the affidavit of claimant's attorney * * *, we accept a claimed attorney fee of $2,900.00 * * * as reasonable.

Under the provisions of 5 C.F.R. § 550.806(c) the payment of reasonable attorney fees shall be deemed to be warranted only if:

(1) Such payment is in the interest of justice, as determined by the appropriate authority in accordance with standards established by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code; and

(2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice.

The Merit Systems Protection Board (MSPB) has enumerated the criteria relating to payment of attorney fees in the interest of justice. In a leading case, *Allen* v. *U.S. Postal Service*, 2 MSPB 582 (1980), the MSPB held that "in the interest of justice" is not coextensive with the concept of prevailing party, but is not limited to cases involving prohibited personnel actions as defined by 5 U.S.C. § 2302 (Supp. III 1979) or agency actions which are "clearly without merit." After reviewing the legislative history of the amendments to the Back Pay Act which provide for the payment of attorney fees, the MSPB held in *Allen* that payment would be "in the interest of justice" under the following circumstances as summarized below:

(1) The agency engaged in a prohibited personnel practice;

(2) The agency's action was clearly without merit or was wholly unfounded or the employee was substantially innocent of the charges brought by the agency;

(3) The agency initiated the action in bad faith;

(4) The agency committed a gross procedural error (not simply harmful procedural error) which prolonged the proceeding or severely prejudiced the employee; or

(5) The agency knew or should have known that it would not prevail on the merits when it brought the proceeding.

The MSPB cautioned in *Allen* that the above list was not exhaustive, but illustrative, and the examples should serve as "directional markers" towards the interest of justice.

In his request for payment, Mr. Hollin argues that payment is warranted in the interest of justice since the agency failed to comply with its own "directives" which constituted a prohibited personnel practice. However, based on our review of the statutorily defined "prohibited personnel practices" contained in 5 U.S.C. § 2302(b), we do not find that the Army committed a prohibited personnel practice. On the other hand, we conclude that attorney fees may be paid "in the interest of justice" since the Army has interposed no objection to payment and since the error committed by the Army borders on gross procedural error.

As we held in *Reyes,* B-206237, *supra,* once the agency-filed application for disability retirement was denied, the Army was obligated to either restore the employee to active duty or to take steps to separate him on grounds of disability, and the Army failed to do either. Our decisions have long held that such action constitutes an unjustified or unwarranted personnel action under the Back Pay Act. Therefore, we conclude that under the circumstances such action constitutes gross procedural error which prejudiced the employee by prolonging the period of involuntary leave and leave without pay for 5 weeks. Accordingly, we conclude that payment of attorney fees is warranted in the interest of justice. 5 C.F.R. § 550.806(c)(2).

The Back Pay Act regulations provide further in 5 C.F.R. § 550.806(d) that:

> (d) When an appropriate authority determines that such payment is warranted, it shall require payment of attorney fees in an amount to be determined to be reasonable by the appropriate authority. * * *.

The MSPB in *Kling* v. *Department of Justice,* 2 MSPB 620 (1980) ruled on the question of what constitutes reasonable fees. The MSPB reviewed the considerable judicial precedent available including the 12 factors outlined in *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). However, the MSPB stated that the preferred approach for cases appealed to the MSPB would be to review the lawyer's customarily hourly billing and the number of hours devoted to the case. See *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3rd Cir. 1973). Therefore, the MSPB concluded that the *Lindy* approach

(hourly rate × hours devoted) would be utilized while the *Johnson* factors could provide guidance. *Kling, supra.*

In his affidavit Mr. Hollin states that the hours devoted to the case totaled 29 hours and the hourly rate is $100. Mr. Hollin has also supplied a statement responding to the 12 factors outlined by the *Johnson* case and has submitted affidavits from 11 other attorneys in the San Antonio, Texas, area attesting to their normal hourly rates. These rates range from $60 to $125 per hour with five attorneys attesting to the fact that they normally charge $75 per hour.

We note that according to Mr. Hollin all of the billable hours were spent conferring with his client and preparing letters and petitions for review. There was no trial or appellate work in this case for which several of the attorneys in the San Antonio area charge hourly rates in excess of $75. Mr. Hollin also states there is no customary fee for such cases but he adds that he was paid $100 per hour in a recent case involving the Social Security Administration. Finally, Mr. Hollin argues that since his fee was contingent upon the success of the case his fee of $2,900 should be adjusted upward.

As Mr. Hollin notes, the MSPB held in *Kling* that a public policy "bonus multiplier" of the attorney's fee would not be justified in cases before the MSPB but that when counsel's compensation is contingent on success, the award could be adjusted upward to compensate the attorney for the risk the attorney accepted of not being paid at all.

Although Mr. Hollin states that his fee was contingent upon success in Mr. Reyes' case, we note that Mr. Reyes paid a retainer of $560 which would be refunded if Mr. Hollin obtained fees from the Government. Thus, Mr. Hollin's reimbursement was not strictly contingent upon success in Mr. Reyes' case. In addition, we believe a reasonable hourly rate under the circumstances in this case is $75. We adopt this figure as most nearly representative of customary hourly rate in San Antonio as evidenced by affidavits supplied by Mr. Hollin from 11 other attorneys in the area. See also the Equal Access to Justice Act, Public Law 96-481, October 21, 1980, codified in 5 U.S.C. § 504, which limits attorney fees awarded under that Act to $75 per hour unless special factors justify a higher award.

Accordingly, we conclude that payment of attorney fees by the Department of the Army is warranted in the interest of justice and that reasonable fees in this case would be Mr. Hollin's hours claimed (29) times a reasonable hourly rate ($75) for a total fee of $2,175.

[B-210200]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Nonresponsibility Finding—Certificate of Competency Denial on Recent Procurement—Resubmission to SBA Not Required

Under limited circumstances, a recent denial by the Small Business Administration (SBA) for a certificate of competency may be used by a contracting officer as SBA confirmation of another finding of nonresponsibility.

Contracts—Default—Reprocurement—Defaulted Contractor—Not Entitled to Award—Full Price Already Paid Under Defaulted Contract

Where a defaulted contractor has been paid the full contract price under the defaulted contract, it is not entitled to award of the repurchase contract because it is not permitted to be paid more than the original contract price. Award of the repurchase contract would be tantamount to modification of the original contract without consideration flowing to the Government.

Matter of: Sayco Ltd., June 14, 1983:

Sayco Ltd., a defaulted contractor under contract No. N00102-81-C-4921, protests the award of a reprocurement contract under request for proposals (RFP) No. N00102-82-R-0247, issued by the Department of the Navy for a quantity of tube fittings. Sayco, having been found nonresponsible under the RFP, protests that it has the right as a small business to have the matter of its responsibility reviewed by the Small Business Administration (SBA) under the certificate of competency (COC) procedures, but that the Navy has refused to refer the matter to SBA. We deny the protest.

The solicitation was a 100 percent small business set-aside with a closing date of September 27, 1982. Sayco submitted the low proposal of $44,676.00 in response to the RFP but was found nonresponsible because of numerous production deficiencies and delinquencies. As a result of the nonresponsibility determination, an award was made to another contractor for $52,990.70.

Sayco maintains that upon being found nonresponsible under the subject solicitation it had a right to apply to SBA for a COC, but that in violation of the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV, 1980), the Navy will not refer the matter to SBA. Sayco requests that our Office direct the Navy to do so.

The Navy, on the other hand, takes the position that the contracting officer's nonresponsibility determination was proper because it was based on the following factors:

(1) Sayco's termination for default on its contract for the item;

(2) A pre-award survey for similar items conducted within 75 days of the closing of this solicitation which concluded that Sayco's production capability, purchasing and subcontracting practices, performance record, and ability to meet required schedules were all "unsatisfactory";

(3) The fact that SBA refused to issue Sayco a COC for similar items only 27 days before the closing date of this solicitation; and

(4) Current information obtained from the Defense Contract Administration Services Management Area, Reading, Pennsylvania DCASMA which detailed Sayco's continuing delinquency.

The Navy emphasizes that the contracting officer based his nonresponsibility determination on his personal knowledge of Sayco's recent default and continuing inability to perform the contract requirements. In this regard, the Navy points to the following statement from DCASMA concerning Sayco:

> The subject contractor's current performance record shows there are 53 delinquent contracts of a total of 63 Government contracts on hand.
>
> This situation has been caused by contractor's bidding on solicitations knowing that deliveries can't be met. Bidding on items that require close tolerances and will require waivers, in most cases, prior to acceptance. Lack of adequate production planning, scheduling and control through the plant.
>
> It is considered extremely likely that subsequent awards will result in late deliveries and additional costs until corrective action is taken.

The Navy argues that, under the circumstances, the record clearly supports the Navy's determination that Sayco was not responsible. The Navy further states, citing *Sigma Industries, Inc.*, B-195377, October 5, 1979, 79-2 CPD 242, that this case was an appropriate one for not referring the matter to SBA.

We think the Navy acted reasonably in not referring the question of Sayco's responsibility to SBA. In *Sigma*, we recognized, in effect, that in very limited circumstances a recent SBA denial of a COC could apply prospectively. In that case, SBA, 4 days before bid opening, had denied a COC in another procurement for a similar item, and contracting officials had ascertained that the firm's capabilities had not improved. Under those circumstances, we did not require referral to SBA. We viewed the very recent denial of the COC as SBA confirmation of the contracting officer's subsequent determination of nonresponsibility. Similarly, in this case, SBA denied the protester a COC for the production of a similar item only 27 days before the closing date for the receipt of proposals. In addition, Sayco already had defaulted on the original contract, and current information available to the contracting officer at the time the finding of nonresponsibility was made indicated no change in the protester's capability to perform.

In any event, we do not believe Sayco properly could have been awarded the reprocurement contract. Sayco's original contract price was $139,612, which was fully paid by the Government. It is well established that a repurchase contract may not be awarded to the defaulted contractor at a price that would give the contractor more than the terminated contract price because this would be tantamount to modification of the terminated contract without consideration. *PRB Uniforms, Inc.*, 56 Comp. Gen. 976 (1977), 77-2 CPD 213. Sayco was unwilling to correct what the Navy views as a defect in what Sayco originally furnished without charge, and here

argues that its proposal price of $44,676 should have been accepted. Since Sayco already has received the full price called for in the original contract, it is not entitled to this additional amount. Although Sayco is challenging the termination for default before the Armed Services Board of Contract Appeals and could, of course, prevail in that litigation, as of the time of award of the repurchase contract Sayco had been defaulted and simply was not entitled to additional compensation for doing what its original contract called for.

The protest is denied.

[B-203393]

Pay—Retired—Survivor Benefit Plan—Spouse—Social Security Offset—Computation

Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment.

Matter of: Dora M. Lambert, June 15, 1983:

This decision is being rendered on the question as to whether the required setoff from an annuity under the Survivor Benefit Plan, 10 U.S.C. 1447–1455, on account of receipt of social security widow's benefits is being correctly computed by the military services. For the reasons stated, we find that a different method of computation which will more closely reflect social security benefits received should be used.

Mrs. Dora M. Lambert, the widow of Major General Joe Lambert, USA, Retired, who died April 21, 1979, is receiving a Survivor Benefit Plan annuity reduced due to her social security benefits. Mrs. Lambert advised us that when she became entitled to the annuity, the amount of the setoff computed by the Army Finance and Accounting Center was $13.50 greater than the social security widow's benefit she was receiving. She pointed out that all of her late husband's social security coverage was earned through his military service and contended that the setoff required by 10 U.S.C. 1451(a) should not exceed the amount of her widow's benefit under social security.

The setoff from Mrs. Lambert's annuity is computed by the Army Finance and Accounting Center in accordance with the regulations contained in Chapter 5 of the Department of Defense Military Retired Pay Manual (DOD Manual 1340.12M) and Chapter 6 of Army Regulations 608–9. We were advised by the Social Security Administration that Mrs. Lambert's monthly social security widow's benefit was correctly computed. They pointed out that Mrs. Lambert's benefit was reduced because General Lambert re-

ceived old age benefits at age 62. This caused his monthly benefits to be less than they would have been had he waited until age 65 (the age at which full benefits are paid). But since Mrs. Lambert was age 65 at the time of his death, she became entitled to a social security widow's benefit equal to his reduced benefit.

Paragraph 90514 of the Department of Defense Military Retired Pay Manual provides that "the reduction factor applies against the total military PIA [primary insurance amount] calculated to member's age 65 regardless of the age when the member claimed benefits under social security."

Failure to reduce the setoff from a survivor annuity when the retired member received reduced social security benefits before reaching age 65 makes the reduction in the annuity of the widow concerned more than the social security benefit received on account of the member's military service. The Department of Defense has taken the position that their regulations and this result are consistent with the provisions of 10 U.S.C. 1451(a). This position is predicated on the requirement that setoff is to be "calculated assuming that the person concerned lives to age 65."

Although we agree that language requires computations of survivor annuity setoffs which will produce setoffs in amounts different from the social security benefit received on account of military service, we do not find that that language supports the reduction made in this type of case.

The Survivor Benefit Plan was designed to supplement the social security benefits received by surviving spouses and dependent children of retired military members and surviving spouses of active duty personnel who die while eligible to retire. To make participating less costly to the retired member while limiting cost to the Government, an offset against the annuity paid to a surviving spouse was required when the spouse becomes entitled to a widow's or widower's benefit under social security.

The language used to implement that purpose is contained in 10 U.S.C. 1451(a) which, as it related to Mrs. Lambert's situation in 1979, provided:

> * * * When the widow or widower reaches age 62 * * * the monthly annuity shall be reduced by an amount equal to the amount of the survivor benefit, if any, to which the widow or widower would be entitled under subchapter II of chapter 7 of title 42 based solely upon [military] service by the person concerned * * * and calculated assuming that the person concerned lived to age 65. * * *

Regarding the integration of the Survivor Benefit Plan with social security benefits, the legislative history of the Plan shows that the offset was intended to be the equivalent of the social security payment which is attributable to the retired member's military service. The method of computing the offset was intended to be a "most generous formula * * * to assure that a widow will receive at least 55 percent of the man's military retired pay." H. Rept. No. 92-481, 92d Cong., 1st Sess., September 16, 1971, accom-

panying H.R. 10670, at page 14. Similar statements appear on pages 30, 31, and 53 of S. Rept. No. 92-1089, 92d Cong., 2d Sess., September 6, 1972.

It is clear, therefore, that the Congress did not intend to authorize an offset which would amount to more than the comparable social security benefit. We do not find that the statutory language of the Survivor Benefit Plan requires or permits that result.

The Department apparently reads the language "assuming that the person concerned lived to age 65" to mean that the person not only lived to age 65 but that he did not apply for social security benefits before reaching that age. We do not agree with that interpretation of the language concerned because, as is evident from Mrs. Lambert's case, that interpretation results in a reduction in total survivor benefits, whereas the provision was intended to be beneficial. Further, under that interpretation the widow's benefit under the Plan plus the social security may be less than 55 percent of the member's retired pay.

The benefit provided by the age 65 provision relates to the annuity reductions applicable to widows or widowers of retired members who die at an early age. If this provision were not included the reduction of survivor benefits received by these survivors would be disproportionately large when compared to the reduction applicable to those beneficiaries whose principals lived to be 65. This is so because the amount of income from military service is a fixed amount. To determine the benefit upon retirement this amount is divided by the number of years between 1950 (or the year the individual became 21) and the year of death or the year he or she became 62. Thus, if the retiree died at an early age the computed social security benefit for military service would be higher than that of the individual who lived longer. This would result in a correspondingly larger reduction in the survivor benefits payable to the widow of the retiree who died at an early age.

The use of age 65 in 10 U.S.C. 1451(a) apparently resulted from the fact that the calculation of the social security primary insurance amount was based upon work performed up to age 65 for covered men. The calculation was based on work performed until age 62 for covered women. See 42 U.S.C. 415(b)(3) (1970). This provision was changed by section 104(b) of the Social Security Act Amendments of 1972, Public Law 92-603, October 30, 1972, 86 Stat. 1329, 1334, to base calculations for both men and women on work performed until age 62. That amendment did not become fully effective until January 1975.

We recognize that the calculation of the social security offset is a theoretical calculation not predicated on the actual social security payments made to the beneficiary. Further, the requirement to include in the calculation the factor of when the retiree claimed social security benefits, if before age 65, will require the Department to obtain information that is not included in the member's

military pay records. However, as in the case of the survivors of retirees who did not qualify for social security benefits, the calculation could be made based on the assumption that the retiree did not receive social security benefits until age 65, but permit a recalculation of the social security offset if the beneficiary demonstrates to the Department concerned that the retiree was receiving a reduced social security payment due to the fact that benefits were initiated before he or she reached 65.

For the reasons stated, in calculating the offset in this case General Lambert's covered military income should be divided by the covered years after 1950 until he reached age 62, less 5 years, as was required in calculating his social security benefit. In that connection the fact that he actually lived to age 65 or is considered to have lived to age 65 would not change the computation of his social security benefit. Further, the reduction in his annuity because he applied for and received social security benefits before he became 65 should also be calculated and the effect of that on Mrs. Lambert's annuity should be determined. Her annuity should be reduced only by the amount of her social security benefit predicated on those calculations.

For the reasons stated the setoff in Mrs. Lambert's case should be recomputed effective April 1979 and her survivor annuity payments adjusted to reflect a setoff not to exceed her social security widow's benefit for the period prior to December 1, 1980. For the period subsequent to that date, section 3 of Public Law 96-402, approved October 9, 1980, 94 Stat. 1705, amended 10 U.S.C. 1451(a) to provide that reduction of a widow's survivor annuity shall not exceed 40 percent of the unadjusted Survivor Benefit Plan annuity. Such further correction as is required under that provision should also be made in Mrs. Lambert's case.

[B-210647]

Bids—Evaluation—Discount Provisions—Applicable Regulation

Agency refusal to consider prompt-payment discount in bid evaluation is proper where solicitation incorporates revision to Defense Acquisition Regulation which precludes consideration of such discounts.

Contractors—Responsibility—Determination—Review by GAO—Affirmative Finding Accepted

Complaint that agency improperly found offeror to be responsible without first conducting preaward survey is not for consideration since preaward survey is not legal prerequisite to affirmative determination of responsibility and such determinations are not reviewed by GAO except in situations not applicable to this case.

Matter of: Sunshine Machine, Inc., June 20, 1983:

Sunshine Machine, Inc. (Sunshine), protests the proposed award of a contract to Mimco Company (Mimco) under invitation for bids

(IFB) No. DLA700-83-B-0434 issued by the Defense Construction Supply Center (DCSC), a field activity of the Defense Logistics Agency. The protest is denied in part and dismissed in part.

On December 10, 1982, DCSC issued a solicitation for 1,607 firehose nozzles. Sunshine wired a bid to the Agency on January 12, 1983, the bid opening date. The bid clearly established Sunshine's unit price as $93.89, but it stated Sunshine's prompt-payment discount as "20 percent days" rather than the 2-percent discount for payment received in 20 days, which Sunshine intended. Sunshine sent another wire on January 13, 1983, clarifying its intent regarding the prompt-payment discount. The Agency did not consider Sunshine's revision to its bid and found Mimco, with a $93.50 unit price, to be the low bidder. In protesting to our Office on January 28, 1983, Sunshine argued that its prompt-payment discount should be considered by the Agency and that, when the discount was considered, Sunshine became the low bidder on the solicitation.

The Agency argues that Sunshine's prompt-payment discount could not be considered because the Defense Acquistion Regulation (DAR) states that prompt-payment discounts should not be considered in the evaluation of offers. DAR § 7-2003.35 (Defense Acquisition Circular 76-36, June 30, 1982). While such discounts were considered in the past, Defense Acquisition Circular 76-36, dated June 30, 1982, revised the prompt-payment discount provisions to preclude consideration of such discounts in bid evaluation.

The solicitation incorporates by reference Standard Form (SF) 33A, Solicitation Instructions and Conditions; SF 33A still contains the conditions under which such discounts can be considered. However, the solicitation also contains a list of modifications to SF 33A, one of which incorporates the provision at DAR § 7-2003.35 and states:

> Paragraph 9(a) of Standard Form 33-A, "Solicitation Instructions and Conditions," is deleted, and prompt payment discounts will not be considered in the evaluation of offers. However, any offered discount will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror. As an alternative to offering a prompt payment discount in conjunction with the offer, offerors awarded contracts may include prompt payment discounts on individual invoices.

While our Office has held that prompt-payment discounts must be considered in the bid evaluation process if the discount provisions are included in the solicitation in their unrevised form, *Geronimo Service Co.*, B-209613, February 7, 1983, 83-1 CPD 130, consideration of the discount would be improper here since the solicitation was revised to reflect the changes in the discount provisions.

In view of the above, it is unnecessary to consider the effect of the clarifying wire because the discount could not be considered in any event.

This portion of Sunshine's protest is denied.

On February 17, 1983, Sunshine amended its protest with our Office and raised questions regarding the Agency's determination

of Mimco's responsibility. Sunshine argues that the contracting officer improperly relied upon a December 1982 preaward survey of Mimco, conducted in connection with another procurement, in reaching his decision to find Mimco responsible. Sunshine contends that Mimco lacks the facilities, experienced personnel, and equipment to perform the contract and that a preaward survey would have confirmed these contentions.

We have consistently held that affirmative determinations of responsibility made by the procuring agency will not be reviewed by our Office unless fraud or bad faith on the part of the contracting agency is alleged or the solicitation contains definitive responsibility criteria which have been misapplied. *D & M Fiberglass Services, Inc.*, B-211165, April 4, 1983, 83-1 CPD 354. Since Sunshine does not argue that these exceptions are applicable here and since there is no legal requirement that a preaward survey be conducted in all cases to determine the responsibility of a prospective contractor, *Klein-Sieb Advertising & Public Relations, Inc.*, B-194553.2, March 23, 1981, 81-1 CPD 214, we will not question the Agency's determination regarding Mimco's responsibility.

This portion of Sunshine's protest is dismissed.

[B-211440, et al.]

Accountable Officers—Accounts—Irregularities, etc.—Reporting to GAO—Federal Claims Collection Standards Compliance Requirement

In erroneous or improper payment cases General Accounting Office (GAO) will exercise its discretion under 31 U.S.C. 3527(c) and deny relief, unless the requesting agency demonstrates that it has pursued diligent collection action. In order to show that such efforts have been taken, relief request must demonstrate compliance with the Federal Claims Collection Standards.

Accountable Officers—Relief—Officials Requiring Relief

Relief should be requested for all persons who had responsibility for or custody of the funds during the relevant stages of a transaction where an improper or erroneous payment was made. Thus, relief requests should include both the person or persons who made the erroneous payment and the official responsible for the account at the time the questionable transaction occurred.

Accountable Officers—Relief—Requirements for Granting—Relief of Supervisor

Relief is granted to a supervisor upon a showing that he or she properly supervised his or her subordinates. Proper supervision is demonstrated by presenting evidence that the supervisor maintained an adequate system of procedures and controls to avoid errors and that appropriate steps were taken to ensure the system's implementation and effectiveness.

Accountable Officers—Accounts—Irregularities, etc.—Reporting to GAO—Time Limitation

An agency must report financial irregularities to GAO within 2 years from the time that the agency is in receipt of substantially complete accounts. This requirement is

to allow the Government the opportunity to raise a charge against the account within the 3-year statute of limitations period.

To Brigadier General Robert B. Adams, Department of the Army, June 20, 1983:

This responds to 10 separate requests for relief from liability for erroneous or improper payments made on behalf of various Army Finance and Accounting officers and agents under 31 U.S.C. § 3527(c) (formerly 31 U.S.C. § 82a-2).[1] For the reasons stated below, we grant relief in nine cases. In the tenth, no decision is necessary because the person for whom relief was requested was not the accountable officer.

We have consolidated these requests primarily in order to draw attention to the lack of effective collection action, and to provide notice that in the future we will exercise our discretion under section 3527(c) and deny requests for relief unless the submission contains evidence that diligent collection action has or is being pursued. In addition, this consolidation of cases provides us with an opportunity to address the following recurring deficiences in the relief requests from your office which, if not corrected, may require a denial of relief in the future: (1) there appears to be some confusion about the proper official for whom relief should be sought; (2) there is frequently insufficient evidence to support a relief request for a supervisor; and, (3) in a few instances, the submissions were delayed so long in reaching our Office that proper consideration could not be given to the requests because the statute of limitations was about to expire. Furthermore, our review of the cases shows specific problem areas which we believe should be brought to your attention. These include (1) issuance of checks without the amounts spelled out in words, which we believe serves to increase the incidences of check alteration; (2) the processing of substitute checks without a sufficient time lag to allow the original check to return through the banking system and be recorded as paid; and (3) the lack of coordination between the Finance and Accounting Center and the Staff Judge Advocate, minimizing the opportunity for restitution. We will address each of these issues in turn, followed by a summary of each case. (The number or letter designation following the statement of facts in each case refers to the problems or deficiencies, discussed below, which we found with the corresponding relief request.)

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[1] Three of the 10 cases here involve situations in which the loss occurred when both an original and replacement check were cashed. In 62 Comp. Gen. 91 (1982), we discussed the fact that a duplicate check case could be handled under either 31 U.S.C. § 3333 (1982) (formerly 31 U.S.C. § 156 (1976)) or 31 U.S.C. § 3527(c). We found that there is a need for Congress and the Treasury Department to determine under which statute these cases are to be resolved and which appropriation should bear the loss. Recognizing that such a process would take time, we decided to follow the *status quo* for a "reasonable time." Therefore, if an agency submits a duplicate check case to this Office under 31 U.S.C. § 3527(c), we will continue to consider it under that statute. We will follow that practice herein and decide the cases pursuant to 31 U.S.C. § 3527(c).

I. Debt Collection

As you are aware, our authority to relieve disbursing officials and agents from liability for illegal, improper, or incorrect payments stems from section 3527(c) which provides:

(c) On the initiative of the Comptroller General or written recommendation of the head of any agency, the Comptroller General may relieve a present or former disbursing official of the agency responsible for a deficiency in an account because of an illegal, improper, or incorrect payment, and credit the account for the deficiency, when the Comptroller General decides that the payment was not the result of bad faith or lack of reasonable care by the official. *However, the Comptroller General may deny relief when the Comptroller General decides the head of the agency did not carry out diligently collection action under procedures prescribed by the Comptroller General.* [Italic supplied.]

Generally, we have granted relief upon finding, either independently or in concurrence with written determinations by the agency concerned, that the payment was not the result of bad faith or lack of due care on the part of the disbursing official. Debt collection, in the past, has not received much attention due primarily to agencies' overriding concern for disbursing, rather than collecting funds, and to slow and ineffective Government collection methods. Recently, however, Congress highlighted the importance of diligent collection action by the passage of the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982), 31 U.S.C. 3711, et seq. (formerly 31 U.S.C. 952). This Act provides Federal agencies with tools and resources essential to aggressive debt collection.

In keeping with congressional intent to place greater emphasis on collection, we believe it is incumbent upon each agency to pursue effective collection action. Therefore, in the future, we will exercise our discretion under section 3527(c) and grant relief only where there is evidence that a diligent collection effort has been made. In order to show that such effort has been made a relief request must demonstrate compliance with the Federal Claims Collection Standards issued jointly by the General Accounting Office (GAO) and the Department of Justice. 4 C.F.R. Parts 101 through 105.

These regulations prescribe the standards for agencies to follow in undertaking collection action, as well as the administrative procedures for use in compromising and terminating agency collection activities. In addition, the regulations provide guidelines for when and how agency collection action is to be referred to GAO for further collection or to the Department of Justice for litigation of civilian claims.

Proposed amendments to the Federal Claims Collection Standards were published in the *Federal Register* on May 24, 1983. 48 Fed. Reg. 23,249-23,257 (to be codified at 4 C.F.R. Parts 101 through 105). The proposed regulations reflect the changes to the fundamental claims collection authority made by the Debt Collection Act, cited above. However, even under the present standards, the head of an agency is required to pursue aggressive collection

action. Such action must be taken in a timely manner with effective follow-up procedures. 4 C.F.R. § 102.1.

At a minimum, collecting agencies must make an appropriate written demand on the debtor informing him of the basis for the indebtedness and specifying a due date for payment. 4 C.F.R. § 102.2. Further, the initial notification should inform the debtor of the consequences of his failure to cooperate. *Id.* Three progressively stronger written demands, at not more than 30-day intervals, should be made unless a response to the first or second letter indicates that future communication would be futile. *Id.* These procedures remain basically the same under the proposed regulations. (See proposed regulation 48 Fed. Reg. 23,251–54, 4 C.F.R. Part 102.)

If more action is necessary, the Federal Claims Collection Standards specify other devices for the agency to employ that entail minimal burden and expense. Under existing standards, these include collection by offset, reporting delinquent debts to commercial credit bureaus and contracting for collection services. *See* 4 C.F.R. §§ 102.3, 102.4, 102.5. The proposed regulations would enhance these tools of collection by giving Federal agencies broader authority to collect debts by administrative offset, by encouraging the use of credit bureaus, by specifically authorizing agencies to contract for commercial collection services, and by permitting agencies to assess interest, processing, and handling costs and penalty charges under specified conditions. (See proposed regulations, 48 Fed. Reg. 23,251–54, 4 C.F.R. Part 102).

Although we are not denying relief due to inadequate debt collection in the cases covered in this decision, we emphasize that regardless of whether relief is granted, the agency still has an affirmative duty to pursue aggressive collection of the erroneous payment from the recipient. 31 U.S.C. § 3711(a)(1) (formerly 31 U.S.C. § 952).

II. Deficiencies in the Requests for Relief

A. *For whom should relief be requested?* We note that in several of these 10 requests, there appeared to be some confusion about the official for whom relief should be requested. As you know, an accountable official or agent is any Government officer or employee who by reason of his employment is responsible for or has custody of Government funds. 59 Comp. Gen. 113, 114 (1979). Also, *see* Title 7 GAO Policy and Procedures Manual for the Guidance of Federal Agencies, § 28.14. There may be more than one accountable officer in a case and the concept of accountability is not limited to the person or persons in whose name the account is officially held. In each case, it is necessary to examine the particular facts and circumstances to determine who had responsibility for or custody of the funds during the relevant stages of the transaction.

The person or persons who made the erroneous or improper payment is financially liable to the Government in the first incidence. In addition, the person in whose name the account is officially held

at the time the wrongful payment is made is also liable for the loss. Therefore, it is necessary to request relief for all of these individuals, unless the agency determines that one or more should be held liable for the loss.

B. *Evidence to support a request for relief of a supervisor.* We found that in a number of instances, the request did not contain sufficient information for us to grant relief to a supervisor whose subordinate made the erroneous payment. This leads us to believe that there is some uncertainty over the evidentiary standard necessary to relieve a supervisor.

The basic rule is that a disbursing agent, officially responsible for an account, is personally liable for the wrongful payments made by his subordinates. *See* B-194877, July 12, 1979. In such cases, we grant relief to the supervisor upon a showing that the disbursing officer properly supervised his employees. Proper supervision is demonstrated by evidence that the supervisor maintained an adequate system of procedures and controls to avoid errors and that appropriate steps were taken to ensure the system's implementation and effectiveness. *See* B-192109, June 3, 1981. Therefore, in order for us to grant relief, it must be clear from the submission what the procedures were and how they were implemented at the time of the questioned transaction.

C. *Timeliness.* We found that a few of your requests were more than 2 years old when submitted. This raises the problem of the statute of limitations, since an accountable officer can escape liability for an improper expenditure if the Government does not raise a charge against the account within 3 years. 31 U.S.C. § 3526(b) (formerly 31 U.S.C. § 82i); B-206591, April 27, 1982. The 3-year period begins to run when the agency is in receipt of substantially complete accounts. B-206591, April 27, 1982. To avoid any statute of limitations problems, the GAO Policy and Procedures Manual requires prompt reports of financial irregularities. An agency must report irregularities not more than 2 years after the date the accounts are made available to GAO for audit (that is, the date the agency has substantially complete accounts). 7 GAO Policy and Procedures Manual § 28.14; B-199542, November 7, 1980.

III. Problem Areas

In several cases, the investigation officers expressed concern over substantive areas of finance procedures. Chief among their complaints were the issuance of checks without the amounts spelled out in words, and the lack of coordination between the Staff Judge Advocate and the Finance and Accounting Center. We concur in their concerns and want to bring these issues to your attention for review. Additionally, we want to include for your consideration the question of substitute checks and when they should be issued, which was the subject of a 1981 General Accounting Office report to the Congress entitled "Millions Paid Out in Duplicate and

Forged Checks," AFMD-81-68, October 1, 1981. While we have made recommendations for corrective action, we understand that the situations may need further investigation. We hope you will give serious consideration to these matters.

A. *Issuance of checks without the amount spelled out in words.* A number of your requests involved losses due to check alteration. In each case, the wrongdoer was able to alter the numerals on the check and receive a larger amount than the real value of the check. The altered checks were able to be cashed because the agents lack time to adequately check the instrument due to the heavy volume of check cashing at the various finance offices. It is our belief that by spelling out, in words, the amount of the check on the face of the instrument the incidents of alteration would decrease. The cashiers would then be able to quickly compare the numerals and words to see that the amounts match.

B. *Coordination between the Finance and Accounting Office and the Staff Judge Advocate.* We note that in several instances the recipient of the illegal or improper payment was a service member. Although charges were brought and the member convicted by the Staff Judge Advocate (SJA), no restitution was sought by the Finance and Accounting Office (FAC). In fact, in one case, collection action was not instituted until after the member was discharged from the service. We would suggest that better communications and coordinations between your office and the SJA be instituted so that restitution could be maximized. Specifically, we suggest that collection efforts would be enhanced if the FAC intervened in the SJA proceedings and if payment of the debt was made an element of the sentence.

C. *No lag time for the issuing of a substitute check.* Three of your requests stemmed from the cashing of duplicate checks. We note that in two instances, the replacement check was issued within 1 week of the original check. We are aware that under the applicable Army regulation, a duplicate check is authorized if the stop payment request by the payee is made within 15 days from the issue date of the original check for checks mailed to addresses in the continental United States, and within 30 days for checks mailed to overseas addresses. AR 37-103, ¶ 4-164. However, we do not think that the regulation requires the issuance of a substitute check immediately upon receipt of the payee's request. In the 1981 GAO report to the Congress, *supra,* we recommended slowing the issuance of some substitute checks. This recommendation was made to allow more time for the original check, if cashed, to be returned through the banking system and recorded as paid. Moreover, we believe that prior to issuing a replacement check, an agency should check to see that the original check has not been negotiated. *See* 62 Comp. Gen. 91 (1982), *supra.* We understand that the purpose behind the quick processing of claims for substitute checks is to

avoid potential hardship for the payee; however, we do not believe the time frame we are suggesting to be unduly harsh.

We now proceed to a discussion of the specific cases.

IV. Cases

B-211045

In this case, you requested that Finance and Accounting Officer, Major (MAJ) P.J. O'Hagan, Finance Corp., Fort Sam Houston, Texas, be relieved of liability for an improper payment in the amount of $682.68.

The loss resulted when former Private Dolores M. Slaid negotiated both the original and substitute checks representing her end-of-month pay. Both checks were drawn on Major O'Hagan's account and were issued on the same day. III C. The substitute check was issued to Ms. Slaid on the basis of her allegation that she had not received the original check and her request for stop payment.

It appears that the request for stop payment and the issuance of a substitute check in this case were within the bounds of due care as established by Army regulations. *See* AR 37-103, paragraphs 4-143(b), 4-161 and 4-164. There also was no indication of bad faith on the part of the Army disbursing officer. Accordingly, relief is granted.

We note that, to date, the entire collection effort has consisted of sending one letter, dated September 15, 1981, to Ms. Slaid, informing her of her indebtedness. That letter was returned undelivered. Although a new address has been obtained for Ms. Slaid, there have been no further attempts to reach her. I.

B-211110

In this case, you requested that Finance and Accounting Officer MAJ M.H. Fleumer, Finance Corps, Presidio of San Francisco, California, be relieved of liability for an improper payment in the amount of $566.49. We find that MAJ Fleumer is not liable for the loss and that there was no need for relief to be requested on his behalf.

The loss occurred when Mr. Michael W. Haliburton negotiated both the original and substitute check representing his civilian pay. Both of these checks were drawn on the account of MAJ J.B. Keller, Jr. Before the loss was recorded, MAJ Fleumer assumed responsibility for MAJ Keller's account. Therefore the loss was reflected in MAJ Fleumer's account. However, it is MAJ Keller who remains liable for the loss since he was officially in charge of the account when both checks were issued. Relief should be requested on his behalf. II A.

We note that MAJ Fleumer sent one letter, dated August 30, 1982, to Mr. Haliburton. The letter was returned undelivered and

attempts to reach the debtor by telephone were equally unsuccessful. I.

As in the previous case, B-211045, we note that the replacement check was issued shortly after the date of the original instrument (here 5 days). III C.

B-211288

In this case, you requested that Finance and Accounting Officers MAJ Billie E. Braswell and his successor, Lieutenant Colonel (LTC) H.D. Flynn, U.S. Army Finance and Accounting Center, Europe, be relieved of liability for an improper payment in the amount of $676.24.

The loss occurred when Mr. Brian A. Miller negotiated both the original and substitute checks representing his civilian pay. Both of these checks were drawn on the account of MAJ Braswell. As we stated in the previous case, B-211110, it is the official responsible for an account when the questioned payments were made that has pecuniary liability for the loss. A successor official, in whose name the account is held when the loss is reported, is not liable. In this case, then, only MAJ Braswell has pecuniary liability. Therefore, it was not necessary to request relief for LTC Flynn. II A.

The first check was issued to Mr. Miller on November 8, 1979. On December 3, 1979, a replacement check was issued based on Mr. Miller's claim that he had not received the first check. III C. Since Mr. Miller's request for stop payment was within the appropriate time frame for checks mailed overseas, it appears that the issuance of the replacement check was proper. *See* AR 37-103, para. 4-164. Accordingly, we grant relief to MAJ Braswell.

According to the record, the sole attempt to recover from Mr. Miller seems to have been one letter sent in February 1981. The letter was never acknowledged by Mr. Miller. I.

The irregularity in the account was recorded in January 1981, but was not reported to our office until more than 2 years later. II C.

B-209716

In this case, you requested that LTC L.M. Crook, Jr., Finance and Accounting Officer, 5th Infantry Division, Fort Polk, Louisiana, be relieved of liability for an improper payment in the amount of $890 made by his subordinate, Specialist Five (SP5) Martin A. Steiner, Cashier.

The loss resulted on February 28, 1980, when SP5 Steiner paid a DA Form 2139, Military Pay Voucher, in the amount of $890 to a person claiming himself to be SP5 Danny L. Reynolds. A subsequent challenge of the payment by SP5 Reynolds initiated an investigation which revealed that the signature of both the certifying officer and that of the payee were forgeries. According to your

letter, a forgery suspect was designated and collection action instituted against him, but a criminal investigation failed to substantiate the charges against him. However, a Finance and Accounting Center (FAC) investigation found that the loss occurred because SP5 Steiner failed to follow the established procedures of comparing the officer's signature on the forged voucher with the officer's signature card. Evidence indicates that SP5 Steiner was aware of the procedure and that he has been held liable for the loss.

It appears from the record that LTC Crook properly supervised his subordinates and we, therefore, grant him relief.

The loss in LTC Crook's account was recorded in June 1980. We should have received a report of this irregularity no later than June 1982. However, it did not reach our Office until November 1982. II C.

Although SP5 Steiner has been held financially liable for the loss, no collection action has been instituted against him. I.

B-201286

In this case, you requested that LTC J.E. Rusk, Finance and Accounting Officer, Fort Lewis, Washington, be relieved of liability for an improper payment made by a subordinate in the amount of $822.

The loss resulted on February 28, 1979, when an unidentified cashier or Class A agent cashed the altered paycheck of then-Sergeant Louis P. Cox. The check as issued was for $322, but Mr. Cox had altered the amount to read $822. In May 1980 the Pacific National Bank, a designated depository, discovered that the check had been altered and notified the Finance and Accounting Center. The loss was reflected on LTC Rusk's June 1980 account.

In order for us to grant relief to LTC Rusk, we must find that he properly supervised his subordinates. However, the record contains no information as to what system of procedures was in effect when the improper payment was made, nor how the system was enforced. We have unsuccessfully attempted to acquire this information from your office. II B. Normally, we would deny relief but the statute of limitations is about to run and the question will soon be moot. II C.

At this point, *only* one collection letter, dated March 4, 1982, has been sent to Mr. Cox. I.

The investigation report suggests that in the future, the check's amount be spelled out in words on the face of the instrument. Alterations would be made more difficult if this were done. We concur. III A.

B-210030

In this case, you requested that LTC T.O. Langhorne, Jr., Finance and Accounting Officer, U.S. Army Infantry Center at Fort

Benning, Georgia, be relieved of liability for an improper payment made by his subordinate, Second Lieutenant (2LT) Anthony J. Deskis, Class A Agent Officer, in the amount of $239.

The loss occurred on May 29, 1981, when 2LT Deskis cashed the apparently altered check of former Private Alphonso B. Nelson. Mr. Nelson altered his $39 check to reflect an amount of $239. The alteration was discovered later that day by a Cash Control Officer. Mr. Nelson was apprehended by military police but because of his civilian status, the case was forwarded to the Secret Service. The Secret Service has turned the case over to a Federal prosecutor with the Army's recommendation that Mr. Nelson be prosecuted for forgery. 2LT Deskis has been held jointly and severally liable for the loss. One letter, dated March 15, 1982, was sent to 2LT Deskis informing him of this fact. I.

In order for us to relieve LTC Langhorne from liability it must be demonstrated in your request that he properly supervised his subordinates at the time of the transaction. While there was insufficient evidence in your original submission, your office later supplied us with the necessary information to enable our Office to grant relief. II B.

This was another instance in which the amount of the check was not spelled out in words on the face of the instrument. III A.

B-209697

In this case, you requested that MAJ J.D. Harwood, Finance Officer, 1st Armored Division, Fuerth, Germany, be relieved of liability for an improper payment made by his subordinate, First Lieutenant (1LT) Harvey A. Menden, Class A Agent, in the amount of $654, reduced to $312 by the recovery of $342.

The loss occurred on May 29, 1981, when 1LT Menden cashed the altered check of then Private Earnest Q. Walker. Private Walker had altered his $54 end-of-month pay to read $654. The same day that the check was cashed, a clerk at the Nuernberg Finance Office noticed the alteration. Private Walker was apprehended and $342 was recovered at that time. Private Walker was tried by Summary Court Martial and received a sentence of forfeiture of $334 out of 1 month's pay and 30 days at hard labor. The remaining $312 of Private Walker's debt was not recovered. I.

The record indicates that MAJ Harwood provided all Class A Agents with detailed instructions governing their duties and responsibilities. Specific procedures were established to ensure the certification of all pay recipients. Accordingly we find that MAJ Harwood properly supervised his subordinates and we relieve him of liability for the loss.

While the investigation report recommended that 1LT Menden be relieved of pecuniary liability for the improper payment, no relief request was made on his behalf. Any Government officer or

employee who physically handles Government funds, even if only occasionally, is "accountable" for those funds while in his or her custody. Since 1LT Menden had physical control of the funds and actually made the erroneous payment, he is jointly and severally liable for the loss. Therefore, collection action should be taken against 1LT Menden, unless you decide to request relief for him also. *See* B-202037, August 31, 1981. II A.

The amount of the check was not spelled out in words on the face of the instrument. III A.

Finally, we note that the debtor was apprehended and brought to trial by the SJA. However, the FAC did not intervene to seek restitution. Although the sentence against Private Walker included a forfeiture of pay, this money went into a general fund instead of toward repayment of the debt. We have been informally advised that collection efforts and the legal proceedings against a debtor are two separate and distinct processes in the Army. III B.

B-209717

In this case, you requested that LTC G.L. Comfort, Finance and Accounting Officer at Fort Lewis, Washington, and his deputies, Ms. Doris M. Peterson and 2LT Michael T. Slye, be relieved from liability for the improper payment of $391.28, made by their subordinate, Private Sharon Perkins, Cashier. Before proceeding with the facts of this case we would like to point out that it was not necessary to request relief for LTC Comfort's deputies. In this situation, the accountable officers liable for the loss are the person(s) who had physical control or custody of the funds and the person in whose name the account is held. Here, LTC Comfort was responsible for the account, and Private Perkins was the person with control over the funds. Ms. Peterson and 2LT Slye, while senior to Private Perkins and in the chain of command, were not responsible for the loss. Therefore, since it had been previously determined to hold Private Perkins jointly and severally liable for the loss, it was only necessary to seek relief for LTC Comfort. II A.

The loss occurred when Private Perkins paid former Private Sanford Johnson, Jr., a soldier separating from the service, $840.83 in cash on a pay voucher in which only $449.95 had been certified for payment. The $391.28 overpayment apparently resulted from the payment of a sum in the wrong column of the voucher. Mr. Johnson was promptly notified of the overpayment and acknowledged his awareness that a mistake had been made. Although Mr. Johnson agreed to return the overpayment to the finance office, he failed to do so. At present his whereabouts are unknown.

LTC Comfort, in whose name the account is held, is responsible for his subordinate's losses. In order to relieve him from liability, it is necessary to find that he properly supervised his employees. Although your initial submission did not contain sufficient evidence

for us to make this finding, in response to our request for more information, we were supplied with the necessary documentation. Accordingly, we grant relief. II B.

Only two letters have been sent to Mr. Johnson and Private Perkins has received but one. I.

B-201131

In this case, you requested that Colonel D.M. Posey, Finance and Accounting Officer, Fort Riley, Kansas, be relieved of liability for the improper payment made by his subordinate, Private James E. Harvey, Cashier, in the amount of $528.16.

The loss resulted from two separate payments made by Private Harvey. Private Harvey made a separation payment to Mr. Russell W. Mims, paying him $732.44 rather than $369.28, the amount actually due. Private Harvey also mistakenly paid Private Lewis P. Silva an advance travel payment of $235 rather than the $70 that was authorized. Mr. Mims has been held jointly and severally liable with Private Harvey for $363.16, the amount of his overpayment; Private Silva has been held jointly and severally liable with Private Harvey in the amount of his $165 overpayment.

The grant of relief to a supervisor for the improper payment made by his or her subordinate involves a determination that he or she maintained and enforced an adequate system of procedures and controls over his subordinates to avoid errors. In this case, the record indicates that the operating procedures were adequate and in effect when the loss occurred. Accordingly, relief is granted to Colonel Posey.

The record shows that two demand letters were sent to Mr. Mims on January 15 and May 27, 1981, and only one to Private Silva on May 27, 1981, without replies or rebuttal from either individual. No collection action has been instituted against Private Harvey although you indicate an intent to do so. We have had no further information about the extent or success of collection efforts in this case. I.

B-211440

On March 24, 1983, you requested relief from liability for MAJ B.W. Hausler, Finance and Accounting Officer, 78th Finance Section, for a subordinate's improper payment of a $500 check. The maker's signature was found to be a forgery.

The Criminal Investigation Division (CID) was contacted and an investigation conducted. The investigation failed to disclose who had written the check or who had authorized its cashing. It was determined that the check was either cashed by a Class A agent for 2nd Battalion, 64th Armor or by a cashier with the Finance Office at Ledward Barracks. On Saturday, November 15, 1980 (the date of the check), no Class A agents were on duty and there was only one

cashier available in the finance office. When questioned, the cashier, who was working on that date for the first time, insisted that he checked all ID cards against each check cashed. Furthermore, he could not recall handling the instrument in question. Since the possibility exists that the check's date was incorrect, the check might have been cashed by a Class A agent or a different cashier at another time. Due to the fact that no log was maintained, there is no way now of identifying the actual agent or cashier who accepted the check for payment.

The investigation concluded that the loss resulted from an authorized check cashing and occurred through no fault or negligence of MAJ Hausler or his subordinates. However, corrective measures were recommended so that the agent or cashier cashing personal or Government checks could be identified in the future. The report indicates that corrective measures were implemented.

The loss of funds was established on MAJ Hausler's January 1981 Statement of Accountability as an uncollectible check. In applying 31 U.S.C. § 3527(c) to instances in which a subordinate actually disburses the funds rather than the disbursing officer, we have granted relief upon a showing that the disbursing officer properly supervised his subordinates by maintaining an adequate system of procedures and controls to avoid errors, and took steps to insure the system's effectiveness. B-192109, June 3, 1981. The record before us includes the standard operating procedures in effect at the time, but little additional information to indicate whether MAJ Hausler actually maintained and practiced these procedures at the time of the loss. II B. However, in view of the uncertainty about the identity of the official who actually cashed the check, we agree that the extent of supervision would be difficult to prove, and therefore grant relief.

Conclusion

Although relief has been granted in 9 of the 10 cases included in this decision, there were weaknesses or deficiencies in the record submitted for each one. Most serious has been the lack of evidence that diligent collection action is or has been pursued, in compliance with the Federal Claims Collection Standards. This decision constitutes notice that in the future, relief may be denied under 31 U.S.C. § 3527(c) unless these problems are corrected and the submission of the relief request is bolstered by the necessary evidence and information.

[B-210998]

Commerce Department—Economic Development Administration—Loan Guarantees—Public Works and Economic Development Act—Defaulted Loans—Loan Collection Process

The Economic Development Administration (EDA) had the authority to sell defaulted loans to borrowers for less than the unpaid indebtedness. EDA's authority under 42 U.S.C. 3211(4) and 19 U.S.C. 2347(b)(2) to compromise loans allows it to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, if EDA determines it is in the Government's interest to do so because of some doubt as to the borrower's liability or the collectibility of the full amount of the loan. However, it is not required to do so if it determines that allowing borrowers to bid on their own obligations would interfere with the integrity of the loan collection process or for other valid reasons.

Matter of: Economic Development Administration—Compromise Authority, June 22, 1983:

This decision is in response to a request from the General Counsel of the Department of Commerce for our legal opinion as to whether the Economic Development Administration (EDA) has the statutory authority to sell defaulted loans at a discount to the borrower or someone acting on the borrower's behalf. For the reasons set forth hereafter, it is our view that EDA does have the authority to sell these obligations to the borrowers for less than the unpaid indebtedness. However, EDA is not legally required to do so if it determines that allowing borrowers to bid on their own obligations would interfere with "the integrity of the loan collection process," or would otherwise be undesirable.

Under the authority of the Public Works and Economic Development Act of 1965, as amended (PWEDA), 42 U.S.C. §§ 3121–3246, and Title II of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2341–2374, EDA makes or guarantees loans to eligible borrowers. When a borrower has defaulted on one of these loans, one of the options that EDA has sometimes used in attempting to collect is a private sale or transfer of its interest in the defaulted loan to a third party having no connection or relationship with the borrower. In September 1982, EDA offered, for the first time, a number of its defaulted loans for public sale. Paragraph 11 of the Offering Circular prohibited borrowers or anyone connected with them from bidding on their own loans as follows:

Bids from borrowers, guarantors, pledgors or affiliates will not be accepted. No person may bid who is acting directly or indirectly on behalf of any person who is absolutely or contingently liable on the indebtedness bid on, or any person who directly or indirectly controls, is controlled by, or is under common controls with any such person. The Bid Form contains a representation by the bidder that the bid is not made on behalf of any such person.[1]

[1] The exclusion of the borrower from the sale was in accordance with EDA's long-standing position, based on a 1976 opinion by its then Chief Counsel that it did not have the authority "to waive or cancel any amount of debt." EDA views allowing a borrower to acquire its own loan at a discount as equivalent to waiving or cancelling part of the debt.

The Commerce letter points out that EDA received numerous complaints from borrowers and others concerning this prohibition against a borrower bidding on his own loan. Also, in hearings on December 14 and 16, 1982, before the Subcommittee on Economic Development of the House Committee on Public Works, subcommittee members expressed concern about the prohibition.[2] In light of the public and congressional concern about this matter, the General Counsel requests us to answer the following questions:[3]

1. May EDA * * * sell an obligation at a discount (*i.e.*, for less than the unpaid indebtedness) to a person who is directly or indirectly liable on the obligation ("obligor")?

2. Where the answer to the first question is "yes," may EDA in the exercise of its discretion, determine that to preserve the integrity of its loan collection process, it will refuse to offer obligations for sale to obligors which it will offer for sale to non-obligors?

3. If the answer to the first question is "no," are there special circumstances in which such a sale would be permissible? For example, would such a sale be permissible when EDA has publicly solicited competitive bids on the obligation, and has received no offer as high as an offer made by an obligor?

In order for us to answer the first question, we must consider the legal basis for EDA's position in this matter. EDA maintains, both in its 1976 opinion and in the current letter from Commerce, that there are two factors which prohibit it from selling a loan to the borrower for less than the outstanding balance, resulting in what EDA would consider to be an unauthorized "cancellation or forgiveness of debt." First, EDA argues that without express statutory authority, which it says it does not have, it cannot approve such a waiver or cancellation of any part of a borrower's debt. Second, it relies on the long-standing position of this Office that no officer or agent of the Government has the authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the Government without adequate legal consideration or a compensatory benefit. *See* 45 Comp. Gen. 224, 227 (1965); 44 *id.* 746, 749 (1965); and 41 *id.* 169, 172 (1961). Also, see *Union National Bank of Chicago* v. *Weaver,* 604 F.2d 543 (7th Cir. 1979) which endorsed our unpublished decision, B-181432, March 13, 1975.

While, as recognized by EDA, the general rule is that the surrender of waiver of contract rights that have vested in the Government without compensation is prohibited, the rule is premised on the absence of any specific statutory authority that would allow such a surrender or waiver.[4] *See* 22 Comp. Gen. 260, 261 (1942).

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[2] Shortly thereafter, EDA's authority to sell these loans without the consent of the borrower was restricted by the enactment of the following provision in the Joint Resolution of December 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1870:

No funds in this title shall be used to sell to private interests, except with the consent of the borrower, or contract with private interests to sell or administer, any loans made under the Public Works and Economic Development Act of 1965 or any loans made under section 254 of the Trade Act of 1974.

[3] For the purpose of answering these questions, Commerce asks us to assume that in each case EDA would make a determination that the proposed sale price was reasonable in light of the available "evidence" as to the amount EDA would expect to realize as a result of a conventional liquidation proceeding.

[4] The rule as stated in the Commerce letter to us recognizes that the Government's contract rights can be surrendered if a statute so authorizes.

Thus, the only legal issue here is whether or not the statutory language governing these loan programs grants EDA the authority to accept from the debtor an amount less than the unpaid balance in complete satisfaction of the Government's claim.

The authority of the Secretary of Commerce, and by delegation the Administrator of EDA, to administer the loan programs established under PWEDA and the Trade Act is quite broad. Under 42 U.S.C. § 3211(4) the Secretary has the following authority with respect to PWEDA loans:

> * * * Under regulations prescribed by him [the Secretary is authorized to] assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as he shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in connection with loans made or evidences of indebtedness purchased under this chapter, and *collect or compromise all obligations assigned to or held by him in connection with such loans or evidences of indebtedness* until such time as such obligations may be referred to the Attorney General for suit or collection; [Italic supplied.] Also *see* 42 U.S.C. § 3211(9) .

The authority of the Secretary under 19 U.S.C. § 2347(a)(2), which governs Trade Act loans, is set forth in virtually identical terms and includes the authority to "collect, compromise, and obtain deficiency judgments with respect to all obligations assigned to or held by him in connection with such guarantees or loans * * *."

(As noted above, EDA's broad authority to sell both types of loans was restricted by the provision in Public Law 97-377 which prohibits such sales for the remainder of the 1983 fiscal year without the consent of the borrower.)

Recognizing that both 42 U.S.C. § 3211(4) and 19 U.S.C. § 2347(a)(2) give EDA authority to compromise loans, the General Counsel states that there is a distinction between authority to compromise a debt on the one hand and authority to forgive or cancel a debt on the other.[5] In this respect the Commerce letter reads as follows:

> A compromise requires that there be a real dispute between the parties, or some uncertainty as to the facts. In the absence of such a good faith dispute or uncertainty, the acceptance of less than the full amount owing to the government in satisfaction of its claim would result in the forgiveness or cancellation of part of the obligation owing to it. Some government agencies are explicitly authorized by law to release claims and cancel obligations, *e.g.*, the Small Business Administration. There is no explicit authorization for this in PWEDA or the Trade Act. (Citations omitted.)

We do not agree with the General Counsel's position concerning the meaning the EDA's statutory authority to compromise obligations. Consideration of the statutory context in which the word appears—authorizing EDA to "collect or compromise" all of the obligations it holds prior to their referral to the Attorney General for suit or collection—suggests that the Congress intended to grant

[5] The primary focus of this decision, and the basis for our conclusion that EDA can sell loans to borrowers at a discount, is the compromise authority granted EDA in these statutes. However, we note that an argument could be made that the language in 42 U.S.C. § 3211(4) and in 19 U.S.C. § 2347(a)(2) authorizing EDA to sell loans at public or private sale upon such terms and conditions as it determines to be reasonable, standing alone, would give EDA the discretion to sell loans to borrowers at a discount. This decision does not specifically address this issue because Commerce's letter does not do so, and we were able to resolve the matter solely on the basis of EDA's compromise authority.

EDA the discretion either to insist on payment in full or to allow the borrower to discharge the debt by paying less than the outstanding balance. There is nothing in the legislative history of either statute that suggests "compromise" was intended to have a more limited meaning.

We recognize that the word "compromise" implies that both of the parties to a dispute make concessions in order to terminate the controversy by mutual agreement. *See* Black's Law Dictionary 260 (5th ed. 1979). Thus, as a general matter, we would not disagree with EDA's view that a compromise requires the existence of a real dispute between the parties or some uncertainty as to the facts. However, the underlying dispute or uncertainty needed to justify a compromise can be based on some genuine doubt as to the collectibility of the entire amount of an undisputed debt. For example, see the following explanation of the Government's compromise authority as set forth in 38 Op. Att'y Gen. 98, 99 (1934):

> There appears to be no statutory authority to compromise *solely* upon the ground that a hard case is presented which excites sympathy or is merely appealing from the standpoint of equity, but the power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection.

That doubt as to the collectibility of a liquidated debt can form the basis of a "compromise" is especially clear in this situation, since the claims that 42 U.S.C. § 3211(4) and 19 U.S.C. § 2347(a)(2) authorize EDA to compromise are based on written debt obligations—the type of claim about which there is ordinarily little or no question as to liability or amount.

Strong support for this position can be found in the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966), recodified at 31 U.S.C. § 3711, and its legislative history. That Act authorizes agencies to consider and compromise claims, not exceeding $20,000, that arise out of their activities. In this respect 31 U.S.C. § 3711(a) provides:

> (a) The head of an executive or legislative agency—
>
> • • • • • • •
>
> (2) may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; * * *

The following statement from one of the committee reports on the legislation when it was enacted in 1966, explaining the need for granting compromise authority to Federal agencies, is especially relevant:

> The committee is familiar with many of the problems which prompted the Department of Justice to recommend the legislation, and the committee feels that this bill embodies a practical and well drafted means to deal with those problems. Much of the difficulty derives from the fact that existing law, with a few exceptions, restricts the authority of the agencies to deal adequately and realistically with claims of the United States arising out of their respective activities. * * * *Very few of the agencies can compromise such claims; that is, accept a lesser amount in full settlement even if such a settlement would be in the interest of the Government and justi-*

*fied by normal practice in business in the light of the debtor's ability to pay and the risks and costs inherent in litigation. * * **

As has been noted, present law does in some instances permit compromise of claims on the agency level. However, those agencies which do have some compromise authority usually have it only with respect to limited types of claims or in a rather small amount. * * * *Only a few agencies like the Small Business Administration have unrestricted prelitigation collection and compromise authority (15 U.S.C. 634(b)(2)).* [Italic supplied.] S. Rep. No. 1331, 89th Cong., 2d Sess., reprinted in 1966 *U.S. Code Cong. and Ad. News* 2532, 2533.

In our view, the foregoing explanation makes it clear that our conclusion in this case is correct. First, it clearly sets forth the view of the Congress that consideration "of the debtor's ability to pay" can justify a compromise by a Federal agency. Second, it defines "compromise" merely as acceptance of "a lesser amount in full settlement" of the Government's claim. Third, it demonstrates that the word "compromise" was not being used in a different sense in the Claims Collection Act and the two EDA statutes. It does this by referring to the Small Business Administration (SBA) as one of the agencies that had "unrestricted prelitigation collection and compromise authority" prior to enactment of the Claims Collection Act. Examination of the cited provision in SBA's enabling legislation—15 U.S.C. § 634(b)(2)—reveals that the authority of the Administrator of SBA "to collect or compromise all obligations assigned to or held by him" is set forth in language that is virtually identical to that used to grant EDA its compromise authority. This indicates that the compromise provisions contained in both EDA's statutes also were intended to grant EDA "unrestricted prelitigation collection and compromise authority" that would allow EDA to forgive a portion of a claim when it determines the debtor is unable to pay the full amount.

Finally, consistent with the clearly expressed legislative intent, the Comptroller General and the Attorney General have prescribed regulations implementing the Claims Collection Act which further support our position. These regulations specifically provide that claims may be compromised "if the Government cannot collect the full amount because of (a) the debtor's inability to pay the full amount within a reasonable time, or (b) the refusal of the debtor to pay the claim in full and the Government's inability to enforce collection in full within a reasonable time by informal collection proceedings."

For the foregoing reasons we believe the word "compromise" as used in 42 U.S.C. § 3211(4) and in 19 U.S.C. § 2347(a)(2) must be interpreted as granting EDA the statutory authority to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, where EDA determines it is in the Government's interest to do so because of some doubt either with respect to the borrower's liability or the collectibility of the full amount of the loan. Accordingly, since EDA may compromise directly with borrowers when there is legitimate doubt as to the collectibility of the full amount of a defaulted loan, there would

appear to be no statutory bar to allowing such borrowers to bid on their loans in similar circumstances.

Having reached this conclusion, however, we should point out that, to our knowledge, EDA has not adopted regulations establishing any specific standards governing its authority to sell defaulted loans or setting forth the circumstances in which such sales will be carried out instead of taking other actions to collect on defaulted loans, such as a conventional liquidation of collateral. Nor has EDA, as far as we know, published regulations establishing specific standards for collecting or compromising loans. Instead the applicable regulations merely restate the broad language set forth in the statutes. For example see 13 C.F.R. §§ 305.100 and 306.33. While we acknowledge that the Federal Claims Collection Act of 1966 did not diminish the existing authority of the head of an agency under statutes such as 42 U.S.C. § 3211(4) or 19 U.S.C. § 2347(a)(2) "to settle, compromise, or close claims," the following provision from the Claims Collection Act standards is relevant in this respect:

> Nothing contained in this chapter is intended to preclude agency disposition of any claim under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, providing for the compromise, termination of collection action, or waiver in whole or in part of such a claim. * * *. The standards set forth in this chapter should be followed in the disposition of civil claims by the Federal Government by compromise or termination of collection action (other than by waiver pursuant to statutory authority) under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, to the extent such other statutes or authorized regulations issued pursuant thereto do not establish standards governing such matters.

Accordingly, unless and until EDA adopts regulations establishing definitive standards governing the compromise of claims it should follow the applicable standards and guidelines set forth in the Claims Collection Act regulations. These standards are currently being revised by our Office and the Department of Justice in light of the increased claims collection authority granted agencies by the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749, approved October 25, 1982.

The General Counsel's second question is whether EDA has the discretion not to "compromise" with borrowers by refusing to sell them their own obligations. Considering the statutory language involved, as well as the basic meaning of the word "compromise," it is clear that EDA has such discretion. Both statutes, 42 U.S.C. § 3211(4) and 19 U.S.C. 2347(a)(2), grant the Secretary broad discretion to sell obligations "at public or private sale * * * upon such terms and conditions and for such consideration as he shall determine to be reasonable."

Moreover, both statutes are written in permissive terms giving the Secretary discretion as to whether to compromise any obligation. It would be contrary to the very concept of compromise to conclude that the Secretary could be compelled to accept less than the full amount from a borrower. Accordingly, EDA may decide to refuse to offer obligations for sale to borrowers which it offers for

sale to others if it determines that is necessary to preserve the integrity of its loan collection process or for any other valid reasons.

Having concluded that the decision of whether or not to permit borrowers to purchase their own obligations at a discount is within EDA's administrative discretion, we should point out that we have serious reservations about the advisability of allowing borrowers to submit bids on and ultimately to purchase their own loans. For example, while Commerce's submission sets forth various policy considerations that might support an administrative decision either to allow or to prohibit sales to borrowers the concerns expressed as to the negative impact of such sales on the integrity of EDA's loan collection process seem especially persuasive. That is, if borrowers knew that, in effect, they could have a portion of their debt cancelled if the loan went into default, they would have a strong incentive not to make the payments required to keep their loans current. Also, based on the information furnished in Commerce's submission, as well as in informal discussions with EDA officials, we understand that it might be very difficult for EDA to differentiate between those debtors that genuinely are unable to pay the entire amount of the debt and those that merely claim such inability in order to avoid repayment of the loan in full. This problem and the related one of establishing a fair and reasonable "upset" or lowest acceptable price for each defaulted loan to be sold, would be exacerbated if numerous loans are sold in a mass public sale rather than on an individual basis. It was precisely this type of "portfolio" sale that precipitated EDA's request to us for a legal opinion.

Moreover, as indicated above, the authority of Federal agencies generally in the area of debt collection was significantly increased by the enactment of the Debt Collection Act of 1982. For example, under section 13 of the Act, 31 U.S.C. § 3718, executive agencies can now enter into contracts with private collection agencies to recover indebtedness owed the United States Government. In light of this increased authority and the new collection mechanisms that are now available to Federal agencies, EDA might wish to consider whether any other method of debt collection would enable it to increase the amounts recovered on defaulted loans compared to the results obtained when defaulted loans are sold, whether or not borrowers are allowed to bid on their own loans.

In any event, the question of whether EDA should adopt a "non-compromise" policy of never selling loans to borrowers at less than full value or a policy of considering each loan individually to determine whether such a compromise would be in the best interests of the Government in a particular case should be left to EDA in the reasonable exercise of its discretion.

It is not necessary for us to answer the third question, in light of our affirmative answer to the first one.

[B-210132]

Travel Expenses—Air Travel—Fly America Act—Employee's Liability—Travel by Noncertificated Air Carriers—Involuntary Re-Routing

En route home from temporary duty overseas an employee indirectly routed his travel to take annual leave in Dublin and scheduled his return flight from Shannon to the United States on a U.S. air carrier. Upon arrival in Shannon the employee was informed that his scheduled flight had been discontinued and the carrier scheduled the employee's transoceanic travel on a foreign air carrier. Since there were no alternative schedules at that point under which the employee could have traveled on U.S. air carriers available under the Comptroller General's "Guidelines for Implementation of the Fly America Act" for the transoceanic portion of his travel, there need be no penalty for the use of a foreign air carrier.

Matter of: Fly America Act Penalty for Involuntary Re-routing, June 24, 1983:

The General Counsel of the Central Intelligence Agency has asked whether an employee must be assessed a penalty under the Fly America Act, 49 U.S.C. § 1517, when the U.S. air carrier flight on which he had scheduled his return to the United States from a point along an indirect route was discontinued and the U.S. air carrier rescheduled the employee's transoceanic travel on a foreign air carrier. The penalty is not applied where the employee originally planned his indirect or delayed travel by U.S. air carriers, but at the time he was to use that planned travel the U.S. air carrier was not available and no alternative schedule was available for travel on U.S. air carriers under the Comptroller General's "Guidelines for Implementation of the Fly America Act," B-138942, revised March 31, 1981.

The employee who was returning from temporary duty overseas arranged to return to the United States through Dublin, Ireland, with a period of leave, rather than returning directly. The employee had confirmed reservations from Shannon, Ireland, to Boston to Washington on U.S. air carriers, but when he arrived in Shannon on the Wednesday his flight was scheduled to depart, he was informed that the flight had been discontinued several weeks earlier and that the next flight by an American carrier was not until that Saturday. The ticket agent for the U.S. air carrier rewrote the employee's return ticket and placed him on the next direct flight to the United States aboard a foreign air carrier to New York. The employee completed his return from New York to Washington on a U.S. air carrier. If the employee had not interrupted his official travel for a period of annual leave in Dublin, his travel to Washington, D.C. would have been performed by U.S. air carrier.

The General Counsel is aware of our decisions involving indirect travel which hold the employee financially responsible to the extent his personal travel results in a reduction in receipt of Government revenues by U.S. air carriers over revenues they would have earned had the employee performed only authorized travel.

Matter of Keller, B-200279, November 16, 1981; *Matter of Griffis,* B-188648, November 18, 1977. However, the General Counsel believes that an employee should not be penalized when a U.S. air carrier involuntarily re-routes the employee and frustrates scheduling arrangements that would not have involved a loss of revenues by U.S. air carriers. In general, we agree that an employee should not suffer a financial loss when a U.S. air carrier frustrates previously made scheduling arrangements that would not have required assessment of a penalty. Derived from our earlier holding to that effect in *Matter of Norberg,* 59 Comp. Gen. 223 (1980), paragraph 3 of the Comptroller General's "Guidelines for Implementation of the Fly America Act," B-138942, revised March 31, 1981, provides in pertinent part:

> 3. Except as provided in paragraph 1, U.S. air carrier service must be used for all Government-financed commercial foreign air travel if service provided by such carriers is available. In determining availability of a U.S. air carrier the following scheduling principles should be followed unless their application results in the last or first leg of travel to or from the United States being performed by foreign air carrier:
>
> * * * * * * *
>
> (c) where a U.S. air carrier involuntarily reroutes the traveler via a foreign carrier, the foreign air carrier may be used notwithstanding the availability of alternative U.S. air carrier service.

Because an employee's obligation under the Fly America Act is essentially one of proper scheduling, we agree that subparagraph 3(c) should apply to indirect as well as direct travel where the employee's scheduling would otherwise be frustrated through no fault of his own. However, because the travel here in question involved the last leg of a trip to the United States, subparagraph 3(c) is not dispositive of the issue raised in this particular case.

The guidelines and our decisions place a higher degree of responsibility on the employee to schedule travel to and from the United States aboard U.S. air carriers. See, e.g., 55 Comp. Gen. 1230, 1233 (1976). For such travel, a foreign air carrier may be used only when U.S. air carrier service is otherwise unavailable under the guidelines. Insofar as applicable to transoceanic travel originating abroad, paragraph 4 of the guidelines provides:

> 4. For travel between a gateway airport in the United States (* * * the first U.S. airport at which the traveler's flight arrives) and a gateway airport abroad (that airport from which the traveler last embarks en route to the U.S. * * *), passenger service by U.S. air carrier will not be considered available:
>
> (a) where the gateway airport abroad is the traveler's origin * * * airport, if the use of U.S. air carrier service would extend the time in a travel status, including delay at origin * * * by at least 24 hours more than travel by foreign air carrier.
>
> (b) where the gateway airport abroad is an interchange point, if the use of U.S. air carrier service would require the traveler to wait 6 hours or more to make connections at that point, or if * * * accelerated arrival at the gateway airport in the United States would extend his time in a travel status by at least 6 hours more than travel by foreign air carrier.

If the employee in this case had been on official business rather than annual leave while in Dublin he would have been obliged,

upon learning that his flight had been discontinued, to travel by U.S. air carrier insofar as such service met the availability criteria set forth above. We see no reason to expect less of an employee who indirectly routes his travel, even though he may be in a leave status and personally responsible for subsistence expenses incurred during the period of delay. Therefore, we will apply the Fly America Act guidelines in determining liability for travel on an indirect route where a U.S. air carrier on which the employee has scheduled his travel discontinues or cancels that flight.

In this case, we find that U.S. air carrier service was unavailable and that the employee properly proceeded by foreign air carrier between Shannon and New York. Since there was no U.S. air carrier departing from Shannon to Boston or any other usual interchange point en route to Washington, D.C., within 24 hours of the foreign air carrier's departure time, U.S. air carrier service was unavailable at that gateway airport under subparagraph 4(a). However, the employee's duty of proper scheduling under subparagraph 3(b) of the guidelines required him to consider routings using foreign air carrier service from Shannon to "* * * the nearest interchange point on a usually traveled route to connect with U.S. air carrier service * * *" to the United States. That interchange point was London. Airline schedules show that an individual arriving at the Shannon airport to board a scheduled 3:05 p.m. flight would have had to stay overnight in London in order to make connections with a U.S. air carrier there. Under this scheduling London becomes the gateway airport. Since London would have been an interchange point rather than the traveler's origin airport, availability of U.S. air carrier service from London to the United States would be determined under subparagraph 4(b) quoted above. Since the wait in London was over 6 hours, U.S. air carrier would have been considered unavailable under subparagraph 4(b) and the employee would have been permitted to proceed by foreign air carrier from London to the United States without penalty.

Since there were no U.S. air carriers available under our guidelines for travel to the United States from Shannon, the employee is not subject to a penalty for proceeding by foreign air carrier.

[B-208515]

Accountable Officers—Accounts—Settlement—Statutes of Limitation

Although a certifying officer at National Institutes of Health (NIH) made a computational error in certifying a voucher for payment, thus proximately causing an overpayment of $11,184, his accounts are settled by operation of law and he cannot be held liable for the loss where the Government did not raise a charge against the account within 3 years of receipt by the NIH of the substantially complete accounts of the certifying officer.

Contracts—Payments—Surety of Defaulted Contractor—"Unexpended Contract Balance"—Calculation of Balance—Mistaken Overpayment to Contractor Included

Under surety law surety has election to pay Government's excess cost of completing contract or undertaking to finish the job himself. Under latter election, surety, upon successful completion, is entitled to his costs, up to the unexpended balance of the contract. In considering amount of unexpended balance available to pay performance bond surety his costs for completion of a defaulted National Institutes of Health contract, Government must consider contract balance to include amount of the Government's previous mistaken overpayment to the contractor.

Matter of: National Institutes of Health Funds Available to Pay Completing Performance Bond Surety, June 28, 1983:

The Chief Certifying Officer, Operations and Accounting Branch, Division of Financial Management, National Institutes of Health, has requested a decision as to whether we will relieve Steven Metcalf, a certifying officer, from liability for an $11,184 overpayment to the general contractor on a contract with the National Institutes of Health (NIH). She has also requested an advance decision as to whether a voucher for $14,394, submitted by a performance bond surety for completion of the contract, may be certified for payment. We conclude that the voucher for $14,394 may be certified for payment from the unexpended balance of the contract plus funds available for construction at the NIH facilities in Bethesda, Maryland. We also conclude that the certifying officer is free from liability by operation of law and that therefore we do not need to consider whether we should relieve him.

On August 30, 1977, NIH awarded T.G.C. Contracting Corporation of New York, a contract for construction work on NIH buildings in Bethesda, Maryland. As required by the Miller Act, 40 U.S.C. § 270a (1976), T.G.C. secured a bond guaranteeing performance of the contract from National Bonding and Accident Insurance Company of Missouri.

Some time after it began work, T.G.C. requested in invoice No. 1, dated September 11, 1978, a progress payment of $37,800. T.G.C requested in invoice No. 2, dated September 22, 1978, a progress payment of $34,806. The certifying officer, Steven Metcalf, apparently adding the sum requested in invoice No. 1, $37,800 (a copy of which was included in the documentation submitted with invoice No. 2) to an $8,190 subtotal on the third page of invoice No. 2, certified payment for $45,990 on invoice No. 2. This was an overpayment of $11,184. Payment was made on December 11, 1978. The error was not discovered until March or April 1979.

In September 1979, NIH, citing T.G.C.'s failure to satisfactorily complete the construction work, declared the corporation in default. In order to secure performance of the contract, NIH entered into a subsequent agreement with National, the performance bond surety, on September 12, 1980. Under surety law, National elected to take over and fulfill T.G.C.'s obligations under the 1977 contract

(as modified in October 1978). NIH released National from any liability on the overpayment and promised to pay National $14,394. National performed to the satisfaction of NIH and, on April 8, 1982, submitted an invoice for $14,394 for its completion costs.

Under the usual rules, applicable to surety take-over agreements, National would be entitled to its completion costs, up to the unexpended balance of the amounts obligated for the contract, without setoff by the Government of the contractor's debts. See FPR 1-18.603-4(c). The question here is whether the negligence of a Government employee in making an overpayment to the defaulted contractor and thus depleting the unexpended contract balance affects the rights of the surety. We think it does not. The overpayment to T.G.C. was not within the scope of the risk which National had consented to undertake. The Government promised in the contract with T.G.C. to make progress payments to T.G.C. as the work proceeded. The contract provided, however, that "there shall be retained 10 percent of the estimated amount [of progress payments] until final completion and acceptance of the contract work." Clause 7, March 8, 1978 Addendum to General Provisions. The contracting officer under this clause could release the retained progress funds only if he found satisfactory progress or if the work was substantially complete. In no case could he pay over the unearned contract balance. The certifying officer's erroneous calculation and his resulting overpayment contravened this provision. The result was a contract balance much lower than would otherwise have been the case.

The effect of premature or unauthorized payments on a performance bond surety was discussed at some length in a 1966 5th Circuit Court decision, *National Union Indemnity Co.* v. *G. E. Bass and Co., Inc.*, 369 F.2d 75, 77. The Court held that where there has been a material departure from the provisions of the contract, relating to the amount of payments and the security of retained funds, the surety is discharged from its obligations on the performance bond to the extent that the unauthorized payments prejudiced his interests. Calling this the "pro tanto release" rule, the Court explained:

> The purpose of the pro tanto release of surety rule is that the material departure from the terms of the contract deprives the surety of the inducement to perform which the contractor would otherwise have, and destroys, diminishes, or impairs the value of the securities taken.

The surety in *Reliance Insurance Co. of Philadelphia, Pa.* v. *Malcalum B. Colbert et al.*, 365 F.2d 530, 534-5 (1966) was also given a "pro tanto" discharge by the court because the defaulting contractor had been overpaid. The court explained the theory succinctly in a footnote on page 535:

> Sureties presumably rely on such payment provisions to provide a source of indemnity in case the contractor defaults. Apparently, the result of Church's failure to abide by [the payment schedule] was that more money was paid to the contractor than he should have received by the time he finally abandoned construction.

The total overpayments constituted the measure of the prejudice the surety suffered and he was therefore entitled to a discharge of his obligations to that extent.

In the present case, the surety did not seek a discharge of its obligations upon learning of the overpayment to T.G.C. Instead, it elected to complete the contract, but sought and received an assurance from NIH that it would not be made to suffer because of the Government's erroneous overpayments to the contractor. We think NIH was justified in giving National that assurance. In *Trinity Universal Insurance Co.* v. *United States,* 382 F.2d 317, 320 (1967), *cert. denied* 390 U.S. 906 (1968), the Court observed that the performance bond surety who elects to complete performance upon default of the contractor confers a benefit on the Government by relieving it of the task of completing performance itself. The Court then concluded:

> The surety who undertakes to complete the project is entitled to the funds in the hands of the Government not as a creditor and subject to setoff but as a subrogee having the same rights to the funds as the Government.

See also *Security Insurance Co. of Hartford* v. *United States,* 428 F. 2d 838, 844 (1970) in which the Court held that a performance bond surety who completed a contract upon the contractor's default was entitled to recover its costs free from any set-off because of taxes owed to the Government by the contractor. The Court explained that its decision "avoids the anomalous result whereby the performance bond surety, if set off were permitted, would frequently be worse off for having undertaken to complete performance."

While none of GAO's previous decisions deal with erroneous payments which deplete the contract balance, they all "recognize the right of a surety who completes a defaulted contract under a performance bond to reimbursement for the expenses it incurs in completing the contract free from set off by the Government of the debts of the contractor." B-192237, January 15, 1979. See also B-189137, May 19, 1978, and B-189679, September 7, 1977. We think the same reasoning applies in this case. The surety should not be made to suffer because of the debt owed by T.G.C. to the Government.

As to NIH's request to relieve the certifying officer from liability, our authority to settle the accounts of accountable officers, such as the certifying officer here, is limited to a 3-year period by 31 U.S.C. 3526(c), 96 Stat. 964 (formerly 31 U.S.C. § 82i), except when a loss is due to the fraud or criminality of the accountable officer. That statute, which was originally enacted when all accounts were physically transmitted to this Office for settlement, provides that such accounts shall be settled "within 3 years after the date the Comptroller General receives the account." As a result of changes in audit methods, however, accounts are now retained by the various agencies where they are subject to our audit and settlement. Ac-

cordingly, we consider the date of receipt by the agency of substantially complete accounts, or, where accounts are retained at the site, the end of the period covered by the account, as the point from which the 3-year period begins to run. B-206591, April 27, 1982; B-205587, June 1, 1982; B-181466, July 10, 1974; 3 GAO Policies and Procedures Manual for the Guidance of Federal Agencies sec. 69.1, fn. 1.

There is no indication of fraud or criminality by the certifying officer here. Since the 3-year statute of limitations began to run from March or April 1979, when the agency's records were complete, enabling it to discover the overpayment, the certifying officer's account with regard to the overpayment has been settled by operation of law. B-206591, *supra;* B-205587, *supra.* We thus need not consider the granting of relief. However, NIH should proceed with aggressive collection action to recover the overpayment from the contractor.

[B-209053]

Bids—Invitation for Bids—Specifications—Minimum Needs Requirement—Administrative Determination—Reasonableness

Protest that agency solicitation for carousel-type automated storage and retrieval system unduly restricts competition is without merit where record shows that agency technical personnel had an opportunity to evaluate the relevant characteristics of the available systems and reasonably determined that the carousel-type system was the only system that could meet its minimum needs and the protester has not shown that the agency's determination was unreasonable.

Bids—Invitation for Bids—Specifications—Minimum Needs Requirement—Justification—Formal Documentation

Agency is not required to prepare a formal document justifying its requiring a carousel-type storage system where agency was familiar with the operating and productivity characteristics and construction features of the available systems and its determination to require the carousel system was made based on this knowledge.

Matter of: J. J. Broderick Company, July 6, 1983:

J. J. Broderick Company protests a requirement in invitation for bids (IFB) DLA004-82-B-0019 issued by the Defense Depot, Memphis, Tennessee, Defense Logistics Agency (DLA), for a carousel-type automated storage and retrieval system [1] for medication and medical supplies. Broderick contends that this requirement is unduly restrictive because it precludes Broderick from offering its "mini-load stacker" [2] system. For the reasons that follow, we deny the protest.

The storage system originally was the subject of a two-step formally advertised procurement which did not specify the particular type of system which must be supplied. The agency received bids from three firms, not including Broderick, under step two of this solicitation. The solicitation was canceled, however, as the result of a protest filed with our Office on issues unrelated to those raised in this protest. *E. C. Campbell, Inc.*, B-205533, July 8, 1982, 82-2 CPD 34. The agency reports that although it was unable to make award under the original solicitation that attempted procurement allowed it to search the industry and evaluate its requirements which resulted in the agency's issuing the current solicitation limited to carousel-type systems.

Broderick contends that its mini-load system can satisfy DLA's requirements for storage and retrieval more efficiently than the

[1] A revolving system which can carry suspended wire baskets, tubs, bins or shelves stocked with supplies, the carousel revolves to the operator's station and access to the storage units is available from the front, rear or side as desired.

[2] A "mini-load" system is used for storing supplies in bins assigned to specific locations. The bins or tubs are arranged in a high density configuration on both sides of an aisle, and the entire system is totally enclosed. The system uses an automated storage/retrieval machine equipped with code-reading scanners, microprocessor controls, and an extractor mechanism for retrieving coded bins. The machine automatically removes desired bins and brings them to an operator station at one end. Ray Kulwiec, *Basic principles of planning, installing and maintaining automated storage and retrieval systems,* in Plant Engineering 44 (1982).

carousel system and at a much lower cost. In support of this position, it cites an independent consultant's report which concludes that while DLA's present manual storage and retrieval system was probably the best option, as between the carousel and mini-load systems the mini-load is superior. In addition, Broderick contends that DLA improperly limited potential suppliers to the carousel system without performing a formal economic and performance analysis to justify the use of that system.

DLA states it is not required to prepare a formal document justifying its need for the carousel system and argues that its technical personnel were familiar with the structure and operation of the mini-load system because Broderick had been given an opportunity to discuss the merits of its system with agency personnel while the previous solicitation was outstanding. It was with this knowledge of Broderick's system, DLA argues, that its technical personnel determined that the carousel system was the only one which satisfied its needs. Finally, DLA notes that it has received bids from two firms under the subject solicitation and did not receive a bid under the prior solicitation from a firm offering a mini-load system.

Some of the major reasons DLA cites for specifying the carousel system follow:

(1) Medical supplies must be stored at temperatures within a certain range, so that the air flow in the storage building must be regulated to maintain an even temperature level. The configuration of the carousel system is open and this allows for the free flow of air around and through the carousel assembly and the individual storage baskets. The mini-load system, on the other hand, is enclosed and this prevents the free flow of air around the medication which precludes easy maintenance of an even temperature level.

(2) The open nature of the carousel baskets permits easy visual access to the stored medications, thus facilitating checks of the expiration dates, while the closed nature of the mini-load system requires each drawer to be pulled and its contents examined—a process more time consuming than with the carousel.

(3) The carousel is the only system capable of significantly greater output levels during emergency conditions.

(4) The storage system must be accessible during power failures and the open nature of the carousel system satisfies this need, while with the mini-load system personnel would have to go inside the system and operate the storage drawers by hand. This, according to DLA, would be a slow and awkward process.

(5) The shelf arrangements in the bins of the carousel can easily be adjusted to reflect different storage needs created by stock changes, while the shelf arrangements of the mini-load system are set at installation and would require significant reprogramming when adjustments are required.

In addition, DLA argues that the carousel system is more easily relocated than the more complex mini-load system and easier and cheaper to maintain because of its simpler design.

Procuring agencies are required to state specifications in terms which will encourage maximum competition and still satisfy the agency's actual minimum needs. Defense Acquisition Regulation § 1-1201(a). A procuring agency is accorded broad discretion in determining its needs because Government procurement officials familiar with the particular conditions under which equipment has to be used are in the best position to know the Government's actual needs and to draft appropriate specifications. *Integrated Forest Management, Inc.*, B-204106, January 4, 1982, 82-1 CPD 6. When a protester challenges a specification as unduly restrictive of competition, the agency must establish that the restrictions imposed are reasonably related to its needs, but the protester retains the burden of showing that the requirements complained of are clearly unreasonable. *Oshkosh Truck Corporation*, B-198521, July 24, 1980, 80-2 CPD 161.

Essentially, Broderick disputes the agency's opinion concerning the superiority of the carousel system for the storage of medical supplies. For example, regarding the agency's stated need for controlled air flow and constant temperatures, Broderick contends that this can be achieved with its system. DLA responds, however—and Broderick does not dispute—that substantial modifications to the ventilation system of the storage building would be required in order to achieve this air flow balance with the mini-load system.

Similarly, regarding the agency's need for a system whose output can be greatly increased during an emergency, Broderick challenges the agency's ability to meet those needs with the carousel system; however, it does not contend or show that its system is capable of meeting those needs. Instead it explains that any great increase in output would require a "totally different concept" in design for the system. In sum, the agency believes that the mini-load system is too complex, slow, inflexible and difficult to maintain to meet its particular needs here. While the protester clearly disagrees with the agency's conclusions, it has not clearly shown that its system possesses the characteristics of the carousel-type system which the agency maintains it needs or that these characteristics are not reasonably related to the agency's needs. Where, as here, the basis of the protest is simply the protester's disagreement with the agency's technical opinion, even where the protester's position is supported by its expert's technical advice, the protester has not met its burden of proof to establish that the agency's position regarding its technical needs is unreasonable. *Sparklet Devices, Inc.—Reconsideration*, B-199690.2, October 8, 1981, 81-2 CPD 285. In such cases the views of the contracting agency must prevail. See *London Fog Company*, B-205610, May 4, 1982, 82-1 CPD 418.

The fact that the agency failed to prepare a formal document containing an economic and performance analysis justifying the requirement for a carousel system is not significant inasmuch as its technical personnel determined the carousel system to be necessary with full knowledge of the operating and productivity characteristics and construction features of the mini-load system. There is no requirement that the agency's rationale for requiring a particular system or type of product in a solicitation be included in a formal document.

The protest is denied.

[B-209499, et al.]

Contract—Protests—Moot, Academic, etc. Questions—Award Made to Protester

Where a protest is against a contract award which has been terminated and the contract has been reawarded to protester, it is academic and will not be considered on the merits. Also, protest against initial proposal evaluation is academic where agency reevaluated the proposal and awarded protester the maximum possible score.

General Accounting Office—Jurisdiction—Contracts—Defaults and Terminations—Review of Procedures Leading to Award

General Accounting Office will review a contracting agency's decision to terminate a contract for the convenience of the Government when that decision results from the agency's determination that the contract award was improper.

Contracts—Termination—Convenience of Government—Erroneous Evaluation, etc.

Agency properly terminated contract with protester where reevaluation of proposals showed that under the stated criteria, another firm received the highest score.

Contracts—Negotiation—Offers or Proposals—Evaluation—Technical Acceptability—Administrative Determination

General Accounting Office will not disturb an agency's technical evaluation unless that evaluation is arbitrary, unreasonable, or in violation of law. In evaluating a firm's experience under an evaluation criteria, an agency may consider the experience of the firm's personnel and the firm's experience prior to its incorporation.

Contracts—Negotiation—Offers or Proposals—Evaluation—Evaluators—Consideration of Personal Statements

Agency correctly found that the personal statements of evaluators concerning a firm should not be considered in evaluating that firm's experience.

Contracts—Negotiation—Technical Evaluation Panel—Evaluation Propriety

The fact that proposals were reevaluated by one person who was not on the original panel is not improper.

Contracts—Negotiation—Offers or Proposals—Evaluation—Technical—Comparison of Proposals Not Required

Since agency was not required to conduct technical evaluation by comparing the proposals it received, offeror's claim that it had greater experience than two other offerors and, therefore, should have received a higher evaluation score is without merit.

Matter of: Data Flow Corporation; Dynamic Keypunch, Inc.; SAID, Inc., July 6, 1983:

Data Flow Corporation (Data Flow), Dynamic Keypunch, Inc. (Dynamic), and SAID, Inc. (SAID), have filed protests under Small Business Adminstration (SBA) request for proposals (RFP) No. 82-16. The RFP was issued for keypunching and verifying services. SAID was initially awarded the contract and this award was protested by Data Flow and Dynamic. After reevaluating the proposals, the SBA determined that Data Flow was the proper awardee, terminated the contract with SAID and awarded the contract to Data Flow. SAID and Dynamic have filed protests against this latter award.

We dismiss the protests by Data Flow and Dynamic against the award to SAID and deny the protests by Dynamic and SAID against the award to Data Flow.

The RFP specified that proposals would be evaluated on the basis of 60 percent for experience, 20 percent for background and 20 percent for cost and that an award would be made to the offeror who received the highest evaluation score. The SBA received six proposals and all were found technically acceptable. These proposals were evaluated by a panel and the three protesters received the following scores:

	Experience	Background	Cost
Data Flow	45	20	$144,000
Dynamic	40	15	146,000
SAID	60	20	179,000

Based on this evaluation, SAID had the highest score and was awarded the contract.

Data Flow, the incumbent contractor, filed a protest against the solicitation's evaluation criteria and panel's decision to give Data Flow a score of 45 out of 60 points for experience. Data Flow claimed that the panel based this score on its unsupported finding that Data Flow was not dependable. After the SBA admitted that it overlooked information in Dynamic's proposal, Dynamic also filed a protest against its evaluation score.

Subsequently, the SBA reevaluated the proposals of Data Flow and Dynamic. The reevaluation of the scores were:

	Experience	Background	Cost
Data Flow	60	20	$144,000
Dynamic	60	20	146,000
SAID	60	20	179,000

Since the three companies had equal technical scores and Data Flow had submitted the lowest cost proposal, the SBA terminated its contract with SAID and awarded a contract to Data Flow.

Since the SBA awarded the contract to Data Flow, its protest is academic. See *VSI Corporation, Aerospace Group,* B-204959, July 30, 1982, 82-2 CPD 94. Since, on reevaluation, Dynamic received the maximum possible score for experience and background, we find that Dynamic's protest against its initial evaluation also is academic. See *Castoleum Corporation,* B-195724, November 29, 1979, 79-2 CPD 381.

These protests are dismissed.

Dynamic and SAID claim that the SBA improperly reevaluated Data Flow's proposal and each claims that it is the proper awardee. We find, however, that there is no basis on which to question the SBA's decision to award the contract to Data Flow.

As a preliminary matter, our Office will review a contracting agency's decision to terminate a contract for the convenience of the Government where, as here, that decision results from the agency's finding that the initial contract award was improper. See *EMS Development Corporation,* B-207786, June 28, 1982, 82-1 CPD 631. Under the present facts, we agree with the SBA that the contract award to SAID was improper.

An evaluation pursuant to an RFP must be based on information contained in the offeror's proposal. *The Management and Technical Services Company, a subsidiary of General Electric Company,* B-209513, December 23, 1982, 82-2 CPD 571. In addition, all offerors must be treated equally. *Analytics Incorporated,* 61 Comp. Gen. 560 (1882), 82-2 CPD 147.

The SBA violated these principles when it failed to consider information in Dynamic's proposal. See *DSI Computer Services, Inc.,* B-207423, August 24, 1982, 82-2 CPD 173. Thus, since the agency was obligated to make an award based on the specified criteria, once a proper evaluation showed that Data Flow received the highest score, it was proper for the SBA to terminate its contract with SAID. See *United States Testing Company, Inc.,* B-205450, June 18, 1982, 82-1 CPD 604.

We now turn to the merits of the protests filed by SAID and Dynamic against the contract awarded to Data Flow. Essentially, the protesters are claiming that, on reevaluation, the SBA should not have given Data Flow's proposal the maximum points for experience.

This Office will only disturb a contracting agency's technical evaluation if it is arbitrary, unreasonable, or in violation of law. *Armidir, Ltd.,* B-205890, July 27, 1982, 82-2 CPD 83. The protesters' claim that this standard is met because in reevaluating Data Flow's proposal, the SBA changed the evaluation criteria for Data Flow alone. To support this allegation, the protesters claim that Data Flow was given 60 points for experience based on the evaluator's belief that Data Flow had 8 years' experience. The protesters note that in its proposal Data Flow only claimed to have 5 years' experience. They further claim that since Data Flow was incorporated in March 1979, it only has 3½ years' experience.

In response to the protesters' claim that it has no more than 3½ years' experience, Data Flow states that while it has only been incorporated as Data Flow, Inc. since March 1979, it operated as Data Entry Services with the same employer's identification number, staff and stockholders since 1978.

The SBA report submitted to our Office states that Data Flow was given a maximum score for experience on reevaluation because its proposal showed that it had 5 years' experience and supervisory personnel with an average of 8 years' experience and the references listed in the proposal were contacted. Thus, the record shows that the evaluator was fully aware that Data Flow was claiming 5 years of experience.

Further, the protesters are wrong to the extent they claim that under our decision in *Medical Service, Consultants, Inc.; MSH Development Services, Inc.,* B-203998; B-204115, May 25, 1982, 82-1 CPD 493, the SBA was prohibited from evaluating Data Flow's experience on the basis of its experience as Data Entry Services or the qualifications of its supervisory personnel. In *Medical Services, supra,* we found that in evaluating the experience of a newly formed subsidiary, an agency was not obligated to consider the experience of a parent company which was not eligible for the contract award. We did not state that an agency could never use a parent company's experience in evaluating a subsidiary. Notably, in *Vector Engineering, Inc.,* B-200536, July 7, 1981, 81-2 CPD 9, we came to the opposite conclusion.

Moreover, we have specifically held that in evaluating a new business, an agency could consider the experience of supervisory personnel. B-167051(1), July 14, 1970. Finally, in a case where experience was stated as a definitive responsibility criteria, we found that where a corporation changed ownership, but continued operating with the predecessor's name and personnel, the experience of the predecessor firm could be considered in evaluating the experi-

ence of the successor firm. 36 Comp. Gen. 673, 674 (1957); *Harry Kahn Associates, Inc.*, B-185046, July 19, 1976, 76-2 CPD 51.

Given these decisions, we find no basis on which to find that by awarding Data Flow 60 points for experience, the SBA changed the evaluation criteria for Data Flow. In reaching this conclusion, we also point out that while an agency must evaluate proposals in accordance with the specified criteria, the agency also is responsible for determining its minimum needs and the criteria which will meet those needs. *Western Ecological Services Company,* B-204550, September 13, 1982, 82-2 CPD 220. In this procurement, the SBA did not specify that the relevant experience was limited to the institutional experience of the entity. Accordingly, it was under no obligation to evaluate proposals on this basis. See *Energy and Resource Consultants, Inc.*, B-205636, September 22, 1982, 82-2 CPD 258.

Dynamic and SAID also claim that the SBA changed the evaluation criteria for Data Flow because either Data Flow did not submit references with its proposal or the SBA did not check these references. They base this conclusion on the SBA's failure to consider negative statements concerning Data Flow's performance on its SBA contract made by the initial evaluators. In addition, SAID has submitted a memorandum written by the SBA contracting officer while Data Flow was performing its SBA contract. SAID claims that this memo demonstrates that Data Flow performed poorly.

The SBA claims that Data Flow did submit references with its proposal and that the person who reevaluated Data Flow's proposal considered these references. Since the record contains only the agency's and the protester's conflicting statements, the protester has not met its burden of affirmatively proving its claim. *International Automated Systems, Inc.*, B-205278, February 8, 1982, 82-1 CPD 110.

Further, the memo which SAID has submitted was written by the contracting officer 2 days after Data Flow began to perform its SBA contract. While the memo states that Data Flow was experiencing difficulty, it concludes that these problems were normal for a new contractor and could be worked out.

Thus, this letter does not demonstrate that the SBA failed to consider a negative reference. Finally, our Office consistently has found that evaluations must be made on the basis of the contents of the proposal as submitted. *University of New Orleans,* B-184194, January 14, 1976, 76-1 CPD 22. Accordingly, the SBA correctly concluded that the personal statements of the evaluators should not have been considered. See *Mutual of Omaha Insurance Company,* B-201710, January 4, 1982, 82-1 CPD 2.

Since we have concluded that the agency's decision to award Data Flow the maximum score for experience was proper, the protesters' claim that the award was made on the basis of cost alone is without merit. Since Data Flow, Dynamic and SAID each received

the same score for background and experience, the only evaluation factor left was the cost. Thus, the agency properly determined that because Data Flow submitted the lowest cost proposal, it was entitled to the contract award. See *Compuserve Data Systems, Inc.*, B-206274, May 20, 1982, 82-1 CPD 482.

Finally, our Office has found that the composition of a technical evaluation panel is to be determined by the procuring agency. *New York University,* B-195792, August 18, 1980, 80-2 CPD 126. Thus, the fact that the Dynamic and Data Flow proposals were reevaluated by one person who was not a member of the original panel is not objectionable. See *Development Associates, Inc.*, B-205380, July 12, 1982, 82-2 CPD 37.

In addition to the above claims, SAID individually has raised two protest grounds. SAID first claims that the agency's decision to give all three offerors the same score for experience and background was arbitrary and unreasonable. SAID reaches this conclusion by reasoning that it should have received a higher score than either Dynamic or Data Flow because, unlike Dynamic, it has previously performed this contract and in comparison to Data Flow's 3½ years' experience, it has 20 years' experience.

It is not the function of our Office, however, to reevaluate proposals and we do not object to evaluations which are consistent with the stated criteria. *AAA Engineering and Drafting, Inc.*, B-204664, April 27, 1982, 82-1 CPD 387. In the present RFP, since the evaluation criteria did not state that experience would be evaluated based on the type or length of experience, the SBA was not required to consider these factors. See *Western Ecological Service Company, supra.* Nor was it improper for the evaluators to judge each proposal against the stated criteria rather than against each other. See *AAA Engineering and Drafting, Inc., supra.* SAID's claim is a mere disagreement with the agency's conclusion rather than a showing that the agency's decision was arbitrary or unreasonable. See *DCG Construction, Ltd.*, B-205574, May 6, 1982, 82-1 CPD 431; *Skyways, Inc.*, B-201541, June 2, 1981, 81-1 CPD 439.

SAID has also questioned the SBA cost evaluation methods and the calculations used to arrive at the weighted scores. However, even if SAID is correct on the cost evaluation, Data Flow would have still submitted the lowest cost proposal. Moreover, in view of our decision that the SBA properly evaluated the experience and background of Data Flow, Data Flow would be the proper awardee, in any event, notwithstanding SAID's new calculation for the weighted scores. Accordingly, we find it unnecessary to review this final allegation. See *Custom Janitorial Service,* B-205023, August 23, 1982, 82-2 CPD 163; *Mutual of Omaha Insurance Company, supra.*

The protests by Dynamic and SAID are denied.

[B-209957]

Travel Expenses—Air Travel—Constructive Cost Reimbursement—Military Airlift Command Service

Employee of the Navy en route from temporary duty overseas selected a particular schedule for the purpose of taking leave along a usually traveled route. He used a foreign air carrier for one leg of his travel even though he could have used Military Airlift Command (MAC) chartered air service for travel from his place of origin to the United States. Since MAC full plane charter services need not be considered as available U.S. air carrier under the Fly America Act his use of a foreign air carrier may be justified in the usual manner using only available commercial flights. However, under his travel order and applicable regulation reimbursement for return travel is limited to the constructive MAC cost.

Matter of: Nelson P. Fordham, July 6, 1983:

Mr. Nelson P. Fordham, an employee of the Navy, appeals our Claims Group's denial of reimbursement for overseas travel on a foreign air carrier when returning to the United States after performing temporary duty. Mr. Fordham claims that there were no U.S. air carriers available along a part of the return route he selected and that his use of the foreign air carrier for a part of the return route was justified. Although under the rules applied pursuant to the Fly America Act, 49 U.S.C. § 1517, we find that a U.S. air carrier was not available along the usually traveled route used by Mr. Fordham, he is not entitled to further reimbursement because the limit on reimbursement imposed by the Navy resulted from his use of commercial rather than Military Airlift Command service.

Mr. Fordham performed temporary duty in Rota, Spain, in the summer of 1979. His travel orders indicated that both commercial and Government air were authorized and considered advantageous to the Government, and he was issued a commercial round-trip ticket for the travel involved. However, while Mr. Fordham was in Rota, he was ordered to proceed to Naples, Italy, to perform additional temporary duty. Before his temporary duty in Naples was completed, the Navy authorized him to travel through Paris for leave purposes on his return from Naples to the United States. This authorization also stated, "Additional TRS costs, if any, will be borne by Mr. Fordham." At the completion of his temporary duty in Naples, Mr. Fordham went to the transportation office there to secure transportation back to the United States through Paris as authorized. Because of the added cost involved and the fact that the transportation office could not secure confirmed reservations on U.S. air carriers, Mr. Fordham made his own arrangements for return travel. He traveled by rail to Rome, the nearest large interchange point for airline service. He states that U.S. air carriers could not get him out of Rome on any route back to the United States for 4 or 5 days—apparently the result of an airline strike. Therefore, he took a foreign air carrier from Rome to Paris and after his period of leave, he obtained transportation to the

United States by U.S. air carrier. He paid for this transportation with the ticket which had been issued to him for return direct from Rota, Spain.

The Claims Group denied reimbursement for use of the foreign air carrier because airline schedules showed daily non-stop service between Rome and New York on U.S. air carriers and because there was no certificate or memorandum by the transportation officer or other appropriate officer explaining Mr. Fordham's use of the foreign air carrier between Rome and Paris. The stop in Paris for leave was characterized as a side trip or indirect travel. Mr. Fordham argues that his travel order, as amended, "directed" him to return to his duty station by commercial air through Paris. From this premise he further argues that the certificate that he executed describing the actual facts concerning the travel justifies the use of the foreign air carrier along the "directed" route, based upon applicable Fly America principles.

Use of Military Airlift Command Transportation

Mr. Fordham's travel order did not direct him to travel by way of Paris but authorized that routing at no added cost to the Government. Other policies of the Navy limited reimbursement to the cost of travel on aircraft chartered by the Military Airlift Command (MAC) from Naples to Philadelphia.

Pertinent regulations provide:

> * * * Air travel is the normal mode of transportation to, from, or between areas outside the United States. Maximum use will be made of Government air or Government-procured air transportation. * * * 2 Joint Travel Regulations (JTR) para. C2001-4(a) (change 162, April 1, 1979).
>
> *Overseas Travel.* Travel may be required by MAC aircraft including charter or individually ticketed commercial service made available by that command, unless medically contra-indicated, for:
>
> 1. employees performing temporary duty travel to and from continental United States or between overseas duty points * * *. 2 JTR para. C2001-4(c) (change 162, April 1, 1979).

The Navy did require their employees to use MAC aircraft on temporary duty between overseas points and the United States. Enclosure 2 of Bureau of Naval Personnel Instruction 4650.14F. If Mr. Fordham had not specifically requested authority to travel through Paris, the transportation office in Naples would have made arrangements for him to travel on a MAC flight between Naples and Philadelphia with commercial connections to Florida. The Commander, Naval Military Personnel Command, who is responsible for making travel arrangements for Naval employees, found that this flight was available for Mr. Fordham. Since this particular flight was the charter of an entire airplane reserved exclusively for Department of Defense personnel, it would have been unaffected by the airlines strike that apparently did affect commercial U.S. air carriers. Although Mr. Fordham would not have been able to obtain space on that flight by himself, the transportation office in

Naples could and would have placed him on that flight, according to the regulations cited had he not chosen to travel via Paris. His situation is described by 2 JTR para. C2001-3(b), which states in part:

> *Employee Elects Commercial Air or Water.* When an employee who is authorized to utilize available MAC or MSC facilities in connection with temporary duty or permanent duty travel elects to utilize commercial air or water transportation at his own expense, reimbursement will be limited as provided in par. C5100. * * *

Paragraph C5100 allows reimbursement to the extent of the cost of the MAC transportation when there is an appropriate statement on the travel order. Since there was an amendment authorizing travel by way of Paris return costs, up to the MAC fare, were allowable.

Fly America Act Considerations

The travel conditions described by Mr. Fordham indicate that the use of the Military Airlift Command full plane charter flight was the only way he could have traveled from Naples to the continental United States on U.S. air carriers. However, the use of MAC charter flights by employees is not covered by the Fly America Act because the procurement of the transportation from an appropriate carrier has been accomplished by MAC. Use of the flight by individuals and payment to MAC for that service is an internal Government matter, not a procurement of transportation services as covered by the Fly America Act. Therefore, we do not find that the available MAC charter flight should be used in determining whether an individual violated the Fly America Act provisions when, as here, commercial transportation is authorized at a cost not to exceed that of MAC transportation. However, the Fly America Act provisions must be applied to the available commercial air transportation in the usual manner as if such travel were authorized as advantageous to the Government, i.e., as if the costs were not limited to MAC costs. Then, within the MAC cost limitation, it should be determined if a Fly America Act penalty must be applied.

We have not overlooked B-138942, November 6, 1978, in which it was held that MAC flights could not be used if use of such flights made it necessary for the traveler to use foreign air carriers to a greater extent than would be necessary for travel by commercial carrier. That rule is not incompatible with the result here since the rule stated is that MAC flights need not be considered as available U.S. carriers in making Fly America Act determinations.

In this case since Mr. Fordham traveled by a direct route and used American carriers to the maximum extent possible in the circumstances, no Fly America Act penalty is applicable.

In the computation of Mr. Fordham's reimbursement it does not appear that a Fly America Act penalty was applied. However, it seems that he was allowed his cost of transportation limited only by the comparative cost of MAC transportation. This resulted in

his owing the Government $90.45 because his allowable costs were less than his travel advances in that amount. Thus, although we find that the reasons given by the Claims Group for disallowing Mr. Fordham's claim were not correct, we cannot allow his claim and, in the circumstances, we find that Mr. Fordham was properly required to refund the amount in question.

[B-210790]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Solicitation Improprieties—Not Apparent Prior to Closing Date for Receipt of Quotations

Amended protest which was filed the day after the protester modified its Federal Supply Schedule contract to include partitions required by the agency under its request for quotations is timely because basis for protest—that agency was required to place an order under the modified contract—did not arise until the modification.

Contracts—Federal Supply Schedule—Multiple Suppliers—Agency Issuance of a Request for Quotations—Evaluation Propriety

GAO finds no legal requirement that procuring agency, after the date an order was ready to be placed under a request for quotations for Federal Supply Schedule (FSS) items, consider fact that low quoter rejected for offering nonschedule items had modified its FSS contract to include rejected items on schedule.

Matter of: Pleion Corporation, July 6, 1983:

Pleion Corporation (Pleion) protests the placement of an order by the Army Corps of Engineers under request for quotations (RFQ) OAS-83-10 with any company other than Pleion. The RFQ is for the purchase and installation of load-bearing acoustic partitions, among other things, from contractors listed in the multiple-award Federal Supply Schedule (SFS) for office systems furniture. No order has been issued by the Army.

For the reasons set forth below, we deny Pleion's protest.

The RFQ was issued to the 23 vendors having FSS contracts for office systems furniture. At the date specified in the RFQ for returning quotations, 17 vendors submitted quotes, with Pleion being the lowest at $211,192.12. However, the Army subsequently determined that it could not accept Pleion's quote because the 65-inch high partitions specified in the RFQ were not included in the company's FSS. Consequently, the Army concluded that Pleion's quote had to be rejected since FSS regulations provide that any agency which is a mandatory user under the FSS cannot use a non-FSS vendor when an FSS vendor is available.

By letter dated February 11, 1983, and received by our Office on February 15, 1983, Pleion protested the Army's determination, contending that the Army's proposed intent to purchase from a company other than Pleion amounted to a *de facto* cancellation of the RFQ under which Pleion was the low, responsive offeror. Pleion

further contended that such cancellation lacked the compelling reason required by the Defense Acquisition Regulation. Finally, Pleion challenged the Army's use of the FSS contracts after the submission of quotes as an illegal auction.

On February 23, 1983, Pleion modified its FSS systems furniture contract specifically to cover 65-inch high partitions. By letter of the same date and received by our Office on February 24, 1983, Pleion changed the basis of its protest. Pleion asserted that the Army should cancel the RFQ because it violated the provision in the Federal Property Management Regulations (FPMR) that agencies shall not solicit bids, proposals, quotations or otherwise test the market solely for the purpose of seeking alternate sources to the FSS. *See* FPMR, 41 C.F.R. § 101-26.401(a) (1982). Pleion further asserted that after the Army cancels the RFQ, it must then consider Pleion's modified FSS contract when purchasing the needed partitions. In the alternative, Pleion asserted that the Army should award a contract to Pleion, the low, responsive, responsible bidder.

The Army argues that Pleion's amended protest was untimely filed. According to the Army, Pleion's assertion that the RFQ should be canceled is based upon an alleged impropriety in the solicitation which was apparent prior to the closing date for the receipt of quotations. Since our Bid Protest Procedures require such a protest to be filed prior to the closing date, Pleion's amended protest should be dismissed as untimely, citing 4 C.F.R. § 21.2(b)(1) (1983). In the alternative, the Army asserts that Pleion was aware of the allegedly defective solicitation on December 27, 1982, when it received the RFQ or, at the very latest, on January 10, 1983, when it responded to the RFQ.

We find that Pleion's amended protest filed on February 24, 1983, was timely. Only after Pleion modified its FSS contract on February 23, 1983, did the company take the position that the Army had to place an order for the required partitions under its modified FSS contract and, thus, disregard the RFQ as being an unlawful usurpation of the multiple-award FSS contract for systems furniture. Until then, Pleion had contended that it had submitted the low, responsive bid under the RFQ to supply 65-inch high partitions and, therefore, was entitled to an award under the terms of the RFQ.

With regard to Pleion's modification of its FSS systems furniture contract after the closing date for the receipt of quotations under the RFQ, the Army argues that the critical time for determining the applicability of an FSS contract is the time that the agency's order under the contract is "ready to be placed." *Pulaski Furniture Corporation,* B-188440, August 10, 1977, 77-2 CPD 107, *affirmed on reconsideration,* B-188440, January 6, 1978, 78-1 CPD 10. According to the Army, an order is ready to be placed either after the closing date for receipt of quotations where a valid RFQ has been issued by the agency or at the latest after the evaluation of the quote submit-

ted in response to the RFQ. Here, the Army states that quotations on the RFQ were due on January 12, 1983, and that as of that date, Pleion's FSS contract for systems furniture did not provide for 65-inch partitions. The Army goes on to emphasize that an order for the partitions would have been in place shortly after the evaluation of the quotes except for the filing of Pleion's protest, which prevented it from procuring the partitions.

In addition, the Army asserts that the integrity of the competitive procurement system would not be served by having to consider now Pleion's modified contract after Pleion's original quote had been rejected because the company did not have 65-inch high partitions on the FSS. In this regard, the Army argues that if it is required to consider FSS contracts as modified up to the time the delivery order is actually placed rather than those in effect either at the closing date for the receipt of quotations or at the time quote evaluations are completed, there would be nothing to prevent the other partition vendors from submitting protests and simultaneously negotiating contract modifications with the General Services Administration to lower their prices. The Army cites our decision in *Casper Systems Corporation,* B-205064, June 28, 1982, 82-1 CPD 626, for the proposition that an auction atmosphere would be created if a contracting agency was required to consider a second quotation from the protester vendor after the protester learned another FSS vendor had submitted a lower quotation.

Pleion argues that the date of actual issuance of the purchase order is the "most sensible" date to view an FSS contract since that is the date when the FSS binds the contractor to a particular delivery. Also, Pleion points out that FSS contracts are more susceptible to unilateral or bilateral amendments than other Federal contracts. Pleion further points out that by its terms, an FSS contract calls for adjustment whenever a contractor's prices change, items are deleted from stock, the Government can get a better prime, or FSS policy changes.

In addition, Pleion claims that Government error was the cause of its 65-inch partitions not being on its FSS contract. In this regard, Pleion claims that GSA was furnished prices covering 65-inch partitions in mid-1982, but no modification to its contract was made by GSA. Finally, Pleion argues that the 65-inch partitions represent only 5 percent of the total purchase.

We conclude that the quotes submitted in response to the RFQ were submitted with a view toward the issuance of a purchase order under the FSS and not as independent offers subject to price negotiation. See *Lanier Business Products, Inc.,* B-196189; B-196190, February 12, 1980, 80-1 CPD 125. In this regard, we note that vendors were not responding to a request for proposals or an invitation for bids with an offer that defined exactly what the vendor would do at what price. *Dictaphone Corporation,* 60 Comp. Gen. 260 (1981), 81-1 CPD 104. The RFQ sought prices under three

categories of straight and curved partitions and also under separate categories for partition hung shelves, partition hung paper sorters, partition hung coat racks, partition hung lights, and installation. Further, the RFQ specified that it was a request for information and that quotations furnished under it were not offers. The RFQ advised vendors to furnish copies of their "current GSA contract" with their quotes. Thus, we find that except for minor installation costs (Pleion's quote for installation was $15,143.52 of $211,192.12), the vendors were responding to an RFQ that was issued to obtain quotes on whatever equipment on the FSS a vendor would propose to meet the specifications and general item descriptions of the RFQ.

Therefore, we agree with the Army that the RFQ was not issued to seek alternate sources to the FSS. Rather, the RFQ was properly issued to determine whether the vendors' proposed FSS equipment would meet the Army's technical requirements, to determine the cost of equipment installation which was not covered by the FSS contracts, and to obtain a shorter delivery time which was permitted by the terms of the FSS contracts. *Lanier Business Products, Inc., supra.*

We have held that the evaluation of quotations for items listed on a multiple-award FSS should be based upon the FSS contracts. *Lanier Business Products, Inc.,* B-203337, September 29, 1981, 81-2 CPD 265. The record shows that the Army's review of the RFQ quotes was completed on February 8, 1983. At that time, a specifically numbered purchase order for the partitions was prepared, but was not issued because of Pleion's initial protest. Consequently, we find that an order was ready to be placed by the Army on February 8, 1983.

We find no legal requirement that the Army consider Pleion's modified FSS contract after the order was ready to be placed. Under the circumstances, consideration of that modification would disrupt the fair and orderly administration of the FSS system, particularly when valid RFQ's are issued in conjunction with that system. At the time the Army had completed evaluation of the 17 RFQ vendor's quotes to determine whether they technically met the Army's requirements, Pleion's FSS contract did not cover 65-inch high partitions. Pleion's initial protest prevented the Army from completing the placement of an imminent purchase order and consequently allowed Pleion time to obtain a modification of its FSS contract. We agree with the Army that obtaining an FSS contract modification under such circumstances would unduly encourage other vendors to submit protests and then obtain modifications to their FSS contracts.

Furthermore, consideration of Pleion's modified FSS contract clearly would create an auction atmosphere. *Casper Systems Corporation, supra.* As noted above, Pleion has attempted to change its status pending a decision by our Office on its initial protest by

modifying its FSS contract and at the same time amending its protest. Moreover, the record also shows that in modifying its FSS contract, Pleion significantly increased its prices for 65-inch partitions from what it listed in its RFQ quote, $211,192.12, including installation, to $280,337.02, excluding installation. In this regard, Pleion displaced one quoter at $236,902, which, like Pleion, had conforming items not on the schedule. Also, several other schedule vendors offering nonconforming items were displaced.

As for Government error, the Army reports that GSA advised that the allegation was untrue. The Pleion FSS contract was not modified in mid-1982 because Pleion did not request or sign a modification at that time. Pleion does not rebut this. Therefore, Pleion's inaction, not Government error, was the cause of Pleion's FSS contract not including the 65-inch partitions on the date the Army was ready to place the order, February 8, 1983. Finally, Pleion's attempt to characterize the 65-inch partition requirement as de minimus is clearly refuted by its quote under the RFQ, under which more than half of the total quote is for those partitions. Consequently, Pleion's failure to quote on schedule items when the order was ready to be placed impacted significantly on the purchase.

Pleion's protest is denied.

[B-211251]

Aircraft—Use by Officers and Employees—Space Requisition—Agency Liability—"Full Cost" of Seat

General Accounting Office is aware of no statute which would prohibit airlines from charging Federal agencies which requisition space aboard already-full carriers not only the fare for the seat or seats requisitioned but also the compensation which the airlines must pay the bumped passenger.

Matter of: Civil Aeronautics Board—Denied Boarding Compensation Rules, July 6, 1983:

The Civil Aeronautics Board (CAB) requests our opinion on whether Federal agencies are precluded by any statute or regulation from paying an airline more than the specified price of the seat or seats when it makes a mandatory space requisition that forces the airline to "bump" a passenger with confirmed reservations, and pay him appropriate compensation under CAB "denied boarding compensation" rules. We are aware of no such prohibition under the circumstances described.

On October 7, 1982, the CAB amended its denied boarding compensation rules, which prescribe minimum standards for the treatment of airline passenger holding confirmed reservations who are not accommodated because the airline oversold their flight. ER-1306, Docket 39932, October 7, 1982. Prior to this amendment, the rules did not require that the carrier compensate passengers who were denied boarding due to Government requisition of space aboard the aircraft. 14 C.F.R. § 250.6 (1982). The CAB explained its

rationale for deleting this exception to the denied boarding compensation rules as follows:

> Today, when a Government agency requisitions space on an already-full plane, denying compensation to passengers who are bumped seems inconsistent with the broad policy underlying these oversales rules. The basic rationale is compensation of the passenger, not punishment of the airline. Furthermore, the airline need not suffer from this change in any event. Where Federal rules require an airline to compensate a passenger bumped by Government requisition, the airline has full justification for requiring the requisitioning agency to pay the whole cost of the taking—the passenger's compensation as well as the basic payment for the requisitioned space. Thus this amendment merely requires the Government to pay the full cost of this action. (47 Fed. Reg. 52985 (November 24, 1982).)

According to the CAB, the airlines objected to the deletion of this exception on the grounds, *inter alia,* that the CAB had not previously "required government agencies to pay these higher amounts for full-plane space requisitions." The CAB, replied that it had assumed, in the absence of some supervening statutory provision, that the airlines were free to charge U.S. Government agencies reasonable amounts, and that where carriers were required to compensate bumped passengers, higher amounts would be reasonable. The Board notes that it in fact assumed that "the real cost of the 'taking' would be normal under the basic assumptions of our legal system."

As noted above, we do not know of any statute or rule which prohibits Federal agencies from paying more than the specified fare level when they make mandatory space requisitions that result in direct financial losses to the airline, in addition to the price of the seat. Indeed, the Fifth Amendment of the United States Constitution, which prohibits the taking of private property for public use without just compensation, appears to require that the Government reimburse an airline from which it requisitions a seat the full cost of that seat. The "full cost," in the event that a passenger has been bumped, is equivalent to the fare for the seat plus the amount which the airline is required to pay to the displaced passenger. We note, by way of analogy, that 46 U.S.C. § 1242(a), which provides for the requisition of vessels owned by U.S. citizens during times of national emergency, requires that the owner of any such vessel be justly compensated for the use of his property.

In conclusion, we think that a requisitioning agency may legally be charged an amount equivalent to the fare for a seat, plus the compensation which the airline is actually required to pay to any passenger who is displaced by such requisition. Of course, if CAB rules permit and the airline is able to induce volunteers to give up their seats in exchange for some lesser benefit,—*i.e.,* less than the amount which CAB rules require for passengers involuntarily bumped—only the lesser amount may be charged to the agency, in addition to the fare.

[B-205921]

Railroads—Railroad Retirement Board—Dual Benefits Payment Account—Borrowing Funds From Railroad Retirement Account—Authority

Authority of Railroad Retirement Board to borrow from Railroad Retirement Account to make payments from Dual Benefits Payments Account is limited to the 30-day period before the beginning of the fiscal year.

Railroads—Railroad Retirement Board—Dual Benefits Payment Account—Borrowing Funds From Railroad Retirement Account—Authority

The authority of the Railroad Retirement Board to borrow funds from the Railroad Retirement Account to permit payment of the Dual Benefits Payments for the first month of a fiscal year does not depend upon the existence of an enacted appropriation or continuing resolution for the Dual Benefits Payments Account for the new fiscal year.

Railroads—Railroad Retirement Board—Dual Benefits Payment Account—Carry-Over Authority

Since the authorization for appropriation to the Dual Benefits Payment Account authorizes an annual appropriation, any amounts remaining in the account at the end of a fiscal year must be returned to the Treasury under 31 U.S.C. 1552(a)(2) unless the actual appropriation act provides carry-over authority.

Railroads—Railroad Retirement Board—Dual Benefits Payment Account—Investment Authority

Under the Omnibus Reconciliation Act of 1981, interest may be earned on funds appropriated to the Dual Benefits Payment Account if invested by the Secretary of the Treasury and this interest credited to the Dual Benefit Payment Account. However, investment is precluded by the terms of the fiscal year 1983 appropriation to the Dual Benefits Payments Account.

Matter of: Railroad Retirement Board—Dual Benefits Payments Account, July 8, 1983:

We have been asked by the Railroad Retirement Board to answer four questions concerning the Dual Benefits Payments Account created by section 1124 of the Omnibus Reconciliation and Budget Act of 1981, Public Law 97-35, 95 Stat. 639, August 13, 1981, amending 45 U.S.C. § 231n (§ 1976). These questions are:

(1) Whether the "borrowing authority" under section 1124(a) of Public Law 97-35 is available to the Railroad Retirement Board after the beginning of a fiscal year, but prior to an actual full appropriation to the Dual Benefits Payments Account for that year;

(2) Whether the borrowing authority is available prior to the start of a fiscal year in the absence of an enacted appropriation;

(3) What happens to any amount remaining in the Dual Benefits Payments Account at the end of a year, and

(4) Whether this Account can earn interest and, if so, whether the interest earned may be utilized during the year to pay windfall benefits.

For the reasons explained below, we have concluded as follows:

(1) The "borrowing" authority to draw funds in advance of the fiscal year ceases at the beginning of the fiscal year.

(2) Whatever funds are left in the Dual Benefits Payments Account at the end of the fiscal year cease to be available for payments.

(3) Interest may be earned on funds appropriated to the Dual Benefits Payments Account if invested by the Secretary of Treasury and this interest credited to the Dual Benefits Payments Account. However, the terms of the fiscal year 1983 appropriation to the Dual Benefits Payments Account would preclude such investment.

(4) An enacted appropriation is not a prerequisite for the exercise of the borrowing authority.

We will address these questions in the order set out above.

Question 1—*Duration of Borrowing Authority.*

Section 1124(a) provides:

> * * * *Not more than 30 days prior to each fiscal year* beginning with the fiscal year ending September 30, 1982, *the Board may request the Secretary of the Treasury to transfer from the Railroad Retirement Account to the credit of the Dual Benefits Payments Account any amount not exceeding one-twelfth of the amount which the Board has determined will be the amount of the appropriation* to be made to the Dual Benefits Payments Account under the applicable Public Law making such appropriation for such fiscal year, and the Secretary of the Treasury shall make such transfer. Not more than 10 days after the funds appropriated to the Dual Benefits Payments Account for each such fiscal year are received into such Account, the Board shall request the Secretary of the Treasury to retransfer from the Dual Benefits Payments Account to the credit of the Railroad Retirement Account an amount equal to *the amount transferred to the Dual Benefits Payments Account prior to such fiscal year under the preceding sentence,* together with such additional amount determined by the Board to be equal to the loss of interest to the Railroad Retirement Account resulting from such transfer, and the Secretary of the Treasury shall make such retransfer. [Italic supplied.]

The explanation for this provision contained in the Conference Committee Report is that:

> * * * Because there is generally a lag between the time appropriations are enacted and the time money is received, the regular retirement account will loan funds temporarily each year to the Dual Benefits Payments Account to continue windfall payments between the start of a fiscal year and the date the dual benefits appropriation is received. This loan will be repaid, with interest, when the dual benefit appropriation is received. H. Rep. No. 97-208, July 29, 1981, at 867.

In the view of the Railroad Retirement Board this "borrowing authority" should be interpreted to authorize the transfer of funds so as to guarantee timely payment of benefits during the lag between the start of a fiscal year and date of an appropriation. The Board's position is that section 1124(a) permits borrowing any time during a fiscal year before the full amount of the appropriation is deposited in the Dual Benefits Payments Account. According to the Board, this authority was provided to prevent what happened in December 1981 when the Department of the Treasury refused to transfer funds as requested by the Board. At that time the Board

was operating under a series of continuing resolutions and, as a result of the failure to transfer the funds when requested during a lag in enactment of a continuing resolution, approximately 400,000 annuitants received their December payments late.

The Department of the Treasury refused to transfer funds from the Railroad Retirement Account as requested because it reads section 1124(a) more restrictively than the Board. Treasury agrees with the Board that although section 1124(a) does not permit a transfer request more than 30 days before the beginning of the next fiscal year, that restriction does not establish a cut-off date for exercising the authority. However, Treasury points out that it is clear from the next sentence which describes the replacement of the amount borrowed as funds transferred "prior to such fiscal year," that the transfer is only available for the 30 days prior to the beginning of the fiscal year. The Board contends that this sentence should only be read as providing authority to transfer funds across fiscal years when it is necesssary to do so.

Essentially, we agree with the position taken by the Treasury. We are inclined to read authority such as that created by section 1124(a) narrowly where there is no indication of Congressional intent consistent with the broader reading. Further, Treasury's reading of the statutory language is consistent with the legislative history explanation of its purpose, quoted above.

We are mindful of the hardships that may result from any delay in benefits. However, it appears from our reading of section 1124(a) and its legislative history that it was intended to solve a different problem than described by the Board.

While it is true that the inability to borrow under the circumstances prevented the Board from making timely payments of the Dual Benefits Payments, it is doubtful that this is the situation which prompted passage of this borrowing authority 3 months earlier. The Conference Committee Report indicates that the Committee was concerned with a recurring problem which it believed happens each year. We do not believe the possibility of a gap in appropriations during the fiscal year is what was being considered in the Conference Committee Report.

As we said earlier, we are inclined to interpret authorities such as section 1124(a) narrowly. There is no indication in the legislative history for the views expressed by the Board. The actual problem presented by the December 1981 delay in payments occurred several months after passage of the Omnibus Reconciliation Act. The Conference Committee Report, consisting of only two paragraphs, suggests no awareness of a problem resulting from a crisis gap in "appropriations," but only a "lag between the time appropriations are enacted and the time money is received" by the account which happens "each year."

Question 2—*Necessity for an Enacted Appropriation.*

The Board states that on September 29, 1982, prior to passage of any appropriation or continuing resolution for fiscal year 1983, the Department of the Treasury informed the Board that in Treasury's view the borrowing authority of section 1124(a) is only available after Congress has enacted an appropriation act or continuing resolution for the new fiscal year.

The Board argues that this interpretation conflicts with the words of section 1124(a) that authorize borrowing based on "one-twelfth of the amount which the Board has determined *will be* the amount of the appropriation *to be made* * * *." According to the General Counsel, this language clearly contemplates circumstances where some form of an appropriation has not been enacted before the beginning of a new fiscal year.

The position of the Department of the Treasury is that the references to a future appropriation that are stressed by the General Counsel are followed by the phrase "* * * under the applicable Public Law making such appropriation for such fiscal year * * *." This phrase suggests, according to Treasury, that the borrowing request must be based on an existing appropriation act. Further, it is possible to explain the references to the future appropriations as no more than a description of the fact that the appropriation for the next fiscal year will not be available immediately, but must await the beginning of the new fiscal year. According to Treasury's position, the legislative history makes it clear that Congress conditioned the borrowing authority on the existence of an enacted appropriation. The reason, more fully quoted above, for the borrowing authority in the conference report, *id.,* is:

> Because there is generally a lag between the *time appropriations are enacted* and the *time money is received* * * *. [Italic supplied.]

The Board concedes that this is the purpose described in the Conference Report, but says there is no reason to believe that this is the only purpose for the act. Indeed, the Board argues that the only useful purpose of the borrowing authority is to cover circumstances where there is no appropriation available for the start of the next fiscal year when the payment tapes are sent to Treasury about September 20 of each year. The Board also notes that the remaining portion of the sentence from the conference report, repeated in part above, does not limit borrowing to a time period, but states that loans are to be used to continue payments "between the start of a fiscal year and the date the dual benefits appropriation is received." The Board points out that there is no qualification in this language as to when an appropriation must be made.

We agree with the Board's position. The relevant sentence in section 1124(a) requires an estimation by the Board of the amount of the appropriation "to be made" under the applicable Public Law to the Dual Benefits Payments Account. An estimation would clearly not be required in the face of an enacted appropriation. Nor would the use of the future tense be correct with reference to the applica-

ble Public Law if it were intended that the Public Law has already been enacted before borrowing would be appropriate. We recognize that the Conference report language relied on by Treasury and quoted above refers to the lag between enactment and receipt of appropriations. However, it clearly states the purpose of the borrowing authority to be the continuation of windfall payments "between the start of a fiscal year and the date the dual benefits appropriation is received." In any event, the legislative language standing alone is sufficiently clear, in our view, to overcome the arguably inconsistent explanation of it in the Conference Report.

Question 3—*Carry-Over of Annual Appropriations.*

The Dual Benefits Payments Account is authorized an annual appropriation under section 1124(a) of Public Law 97-35 as follows:

> There is hereby authorized to be appropriated to such account for each fiscal year * * * such sums as are necessary to pay during such fiscal year the amounts of annuities estimated by the Board * * *

The Board argues that Congress intended that any unexpended amounts be carried over from year to year. The Board's reasoning is based on the requirement of section 1122(c) (to be placed in the Code at 45 U.S.C. § 231f(c)) that the Board fully expend the appropriation in a manner that provides equal monthly installments to eligible annuitants. The only way to accomplish this without either a smaller payment or a larger balloon payment for the last month is to leave a cushion amount that would not be expended at all during the fiscal year, in the Board's view.

We recognize that Congress has required the Board to come as close to the ideal, as expressed by its submission, as possible. However, we do not read the provisions of section 1122(c) as indicating an intent to permit the carryover of budget authority. Section 1122(c) is not as restrictive as the Board describes it. First, the "equal monthly installments" are only required "for a fiscal year so far as practicable." Second, this section requires only "* * * the total amounts paid * * * *shall not exceed* the total sums appropriated * * * for that fiscal year." [Italic supplied.] Third, this section gives authority to the Board to prescribe regulations to achieve these objectives, thus giving the Board authority to devise some reasonable solution to the problem. See Conference Report, *id.* Accordingly, we conclude that, unless the appropriation language itself modifies the authorization of appropriation language of section 1124(a) to make it available until expended, no part of the Dual Benefits Payments Account appropriation is available for expenditure after the end of the fiscal year for which it was appropriated. Such language is not included in the fiscal year 1983 appropriation to the Dual Benefits Payments Account, Pub. L. No. 97-377, 96 Stat. 1903, December 21, 1982, quoted below.

Question 4—*Investment of Amounts in Dual Benefits Payments Account.*

Section 1124(b) of Public Law 97-35 adds the Dual Benefit Payments Account to the accounts under 45 U.S.C. § 231n(e) that may be invested in Government interest bearing obligations or guaranteed obligations.

According to the Department of the Treasury, its practice has been to credit the interest earned on the investments of the other accounts (the Railroad Retirement Account and the Railroad Retirement Supplemental Account) to these accounts as permitted by section 231n(e). Treasury says it has done this despite the absence of specific authority as is normally provided in legislation that gives accounts investment authority, such as in the case of the Social Security Trust Fund, 42 U.S.C. § 401(f) (1976). We agree with Treasury that interest has been properly credited to the accounts covered by section 231n(e). The legislative history is clear that Congress intended that the interest earned be credited to these accounts. H. Rep. 93-1345 at 17 (1974). Since Congress added the Dual Benefits Payments Account to this same provision, an intent that the interest earned on the Dual Benefits Payments Account be treated similarly is evident.

The investment authority provided, however, is only for funds "not immediately required for the payment of annuities, supplemental annuities, and death benefits." In the continuing resolution that appropriated funds for the Dual Benefits Payments Account for fiscal year 1983, Congress provides as follows:

> For payment to the Dual Benefits Payment Account, authorized under section 15(d) of the Railroad Retirement Act of 1974, $430,000,000, which shall be credited to the account in 12 approximately equal amounts on the first day of each month in the fiscal year. Pub. L. No. 97-377, 96 Stat. 1903, December 21, 1982.

This language, by making the funds available to the Dual Benefits Payments Account in monthly installments, virtually precludes the Board from invoking its authority to direct the Secretary of the Treasury to invest the appropriation. Furthermore, the appropriation was intended to provide full funding for payments to beneficiaries for fiscal year 1983.

Accordingly, we conclude that the manner in which funds are provided to the Dual Benefits Payments Account for fiscal year 1983 precludes their investment. Investment of these funds in future years would be dependent on the language of appropriation acts.

[B-210055]

Appropriations—Fiscal Year—Availability Beyond—Order Arising From Unfair Labor Practice Proceeding—United States Information Agency

Unobligated balance of fiscal year 1982 Salaries and Expenses appropriation for the United States Information Agency remains available for obligation to fulfill any order of the Foreign Service Labor Relations Board arising out of an unfair labor practice proceeding instituted in September of 1982. Under 31 U.S.C. 1502(b), provisions of law providing for the expiration of appropriations and their reversion to the Treasury do not apply to the funds involved in the pending proceeding.

Matter of: Availability of Fiscal Year 1982 funding for award of performance pay to members of the Senior Foreign Service, July 8, 1983:

The Regional Director of the Foreign Service Labor Relations Board (Board) has requested an advisory opinion on the current availability of fiscal year 1982 funds for the award of performance pay for that year to employees of the United States Information Agency (formerly the International Communications Agency) (Agency) who are members of the Senior Foreign Service. For the reasons set forth below, we hold that unobligated fiscal year 1982 funds remain available for such awards.

By way of background, the Regional Director explains that Chapter 10 of the Foreign Service Act of 1980, Pub. L. No. 96-465, 94 Stat. 2071, 2128 (22 U.S. Code §§ 3901 note, 4401), established a labor-management relations program in the foreign service and created the Foreign Service Labor Relations Board within the Federal Labor Relations Authority. The Act also created the Foreign Service Impasse Disputes Panel (Panel) to assist in resolving negotiation impasses arising during collective bargaining, 22 U.S.C. § 4110, and required that final action of the Panel be binding on the parties for the term of the collective bargaining agreement unless the parties have agreed otherwise, 22 U.S.C. § 4110(c)(3). Both the Board and the Panel were given jurisdiction over agencies having foreign service operations including the Agency, 22 U.S.C. § 4103. Section 1015 of the Act, 22 U.S.C. § 4115, created an unfair labor practice process, and defined unfair labor practice to include failure or refusal by an agency "to cooperate in impasse procedures and impasse decisions as required under this chapter."

Local 1812 of the American Federation of Government Employees (Union), certified in 1978 as the exclusive representative for all eligible Foreign Service employees in the Agency, requested that the panel consider a negotiation impasse concerning the Foreign Service selection boards established by section 602 of the Act. Specifically, the parties were in dispute over (1) the composition of selection boards established to make recommendations concerning performance pay, (2) the precedures to govern the issuance of such recommendations, and (3) whether the Agency head was to be

bound by the recommendations. The Union proposed (1) that the composition of selection boards be governed by *The Agreement For The Establishment and Composition of Selection Board,* (2) that the selection boards determine the percentage of the funding available for performance pay to be awarded to each officer recommended, (3) that these recommendations be binding upon the Director, and (4) that the total amount of agency performance pay to be awarded for each class of officers be determined by the Director in writing before any boards were convened. On August 18, 1982, the Panel issued a Decision and Order in *United States International Communications Agency, Washington, D.C.* and *Local 1812, American Federation of Government Employees, AFL-CIO,* Case 83 FSIDP 3. The Panel concluded that the dispute should be resolved on the basis of the Union's proposal and ordered that the parties adopt and implement it no later than September 1, 1982.

In a letter dated August 30, 1982, the Agency refused to implement the Panel's Decision and Order. The Union, on September 13, 1982, filed an unfair labor practice charge before the Board, alleging that such refusal violated section 1015(a)(5) and (6) of the Act, 22 U.S.C. § 4115(a)(5) and (6).

In a decision dated March 25, 1983, an Administrative Law Judge of the Board recommended that the Board adopt an order compelling the Agency to implement the Decision and Order of the Panel, and to comply with such order as if it had done so no later than September 1, 1982. The Judge's decision directed the Agency to determine the amount of performance pay that was available as of August 30, 1982, and to treat such funds as now available for the payment of fiscal year 1982 performance awards. The Agency has filed an exception to the Judge's decision, and the Board is now considering whether to affirm or reverse the decision.[1]

We are asked whether fiscal year 1982 funding remains available for the award of performance pay under the Panel's order. According to the submission, both the Union and the Agency believe that the fiscal year 1982 funds expired on September 30, 1982, and that, in the absence of the obligation of those funds by completion of the selection board process, they are no longer available or retrievable. The Agency points out that:

> * * * no performance pay selection boards were ever convened, no decision was ever made by the Agency as to whether any awards should be made in FY 1982, or in what amount, and no funds were obligated for performance pay purposes prior to the end of the fiscal year on September 30, 1982.
>
> On the contrary, since the Agency's payroll costs were running higher than planned, the entire amount available for payroll purposes for that fiscal year, in-

[1] In a letter dated May 12, 1983, which referred to our regulation at 4 C.F.R. § 22.8, the Union's attorney requested that we decline to issue an opinion in this case on the ground that the matter has been decided by the Administrative Law Judge and "is more properly within the jurisdiction of the" Foreign Service Labor Relations Board. We disagree with the assertion that the question posed to us has been decided by the Judge and with the suggestion that such question is more properly within the jurisdiciton of the Board. We have been asked whether fiscal year 1982 funding remains available for the payment of the performance awards, a question which the Judge has not answered. In fact, he notes in footnote 13 to his decision that he is "aware that Fiscal Year 1982 has ended," and he declines to express an opinion "as to how, or from what source, performance awards can, or should, be paid." Certainly, a question as to the period of availability of appropriated funds is suitable for resolution by this Office.

cluding the $230,000 [originally included within the Agency's financial plan for FY 1982 performance pay awards] was expended for other pay purposes. At the close of FY 1982, only $1,324.34 remained unobligated in the Foreign Service pay allotment.

The Regional Director of the Board notes that paragraph (6) of 31 U.S.C. § 1501(a) provides that an amount may be recorded as an obligation of the United States Government when supported by documentary evidence of "a liability that may result from pending litigation." The Regional Director accordingly contends that "previously unexpended expired funding relating to the award of performance pay remains available for obligation due to the pending unfair labor practice."

We agree with the Regional Director's conclusion, but not for the reason he argues. Subsection 1501(a) only provides that amounts may be recorded as obligations when supported by certain specified types of documentary evidence. It does not preserve the availability of funds beyond the end of a fiscal year when obligation of the funds did not take place during the year.

Further, with respect to paragraph 1501(a)(6), we have held that the phrase "a liability that may result from pending litigation" is applicable in only limited instances. For example, in 35 Comp. Gen. 185, 187 (1975) we stated:

> Subsection 6 was included in [31 U.S.C. § 1501(a)] for the purpose of permitting obligations to be recorded in the case of land condemnation proceedings under the Declaration of Taking Act * * * and similar cases. * * * In land condemnation and similar cases, a liability of the Government has been established, the only question being an exact determination of the amount of the liability. An intent to permit obligations to be recorded in every case where litigation is pending against the Government, which may or may not result in a liability, cannot possibly be imputed to the Congress. In view thereof and since the overall purpose of [31 U.S.C. § 1501(a)] was to restrict the amounts recorded as obligations, it is our view that obligations may be recorded under [31 U.S.C. § 1501(a)(6)] only in those cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government's liability.

We concluded in that case that amounts of back pay which might become due certain employees for a prior fiscal year as a result of pending litigation did not constitute obligations which could be properly recorded under 31 U.S.C. § 1501(a)(6).[2]

In the case now before us, the Government is not "definitely liable for the payment of money out of available appropriations." Section 405(c) of the Foreign Service Act of 1980, 22 U.S.C. § 3965(c), provides:

> The Secretary shall determine the amount of performance pay available under subsection (b)(2) each year for distribution among the members of the Senior Foreign Service and shall distribute performance pay to particular individuals on the basis of recommendations by selection boards established under section 602 [22 U.S.C. § 4002].

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[2] We expanded our interpretation of paragraph 1501(a)(6) to include anti-impoundment litigation in 54 Comp. Gen. 962 (1975). *See also* 61 Comp. Gen. 509 (1982). We reasoned that the basic premise of such litigation was that the refusal of the Executive branch to obligate appropriations was itself in derogation of the congressional design in providing appropriations. We thus concluded that it would be incongruous to construe 31 U.S.C. § 1501(a)(6) in a manner permitting its application to frustrate congressional objectives where the existence of substantial legal issues could be documented. This application of paragraph 1501(a)(6) is not relevant in the current discussion, however, since no impoundment of funds is involved.

Both a report on the bill (H.R. 6790) prepared by the House Committee on Foreign Affairs, H. Rep. No. 96-992(I), 96th Cong., 2d Sess. 40 (1980), and a report prepared by the House Committee on Post Office and Civil Service, H. Rep. No. 96-992(II), 96th Cong., 2d Sess. 60 (1980) explained that:

> * * * The determination of the total amount which shall be made available in any one year is a budgetary determination left with the individual heads of the agencies, which means that members of the Senior Foreign Service are not [automatically] [3] entitled to performance pay.

The report of the Senate Foreign Relations Committee, S. Rep. No. 96-913, 96th Cong., 2d Sess. 40 (1980), contained language identical to that of the report of the House Foreign Affairs Committee. This legislative history supports our conclusion that the law does not create a statutory entitlement to performance pay in members of the Senior Foreign Service. Since there is no statutory entitlement to performance pay, the Agency was not definitely liable to pay these awards from fiscal year 1982 funds. Therefore, under 31 U.S.C. § 1501(a)(6), fiscal year 1982 funds could not have been obligated on the basis of the unfair labor practice action brought before the Board.

Nonetheless, it is our opinion that any fiscal year 1982 funding which has not already been obligated for other agency purposes remains available for the payment of 1982 performance awards.[4] Subsection 1502(b) of title 31 provides that:

> A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance.

Clearly the unfair labor practice proceedings, instituted by the Union on September 13, 1982, for the purpose of compelling the Agency to comply with the Panel's order, is a right of action "involving the right to an amount payable from" the Agency's fiscal year 1982 Salaries and Expenses appropriation. Therefore, under 31 U.S.C. § 1502(b), neither subsection 1502(a) of Title 31 nor any other provision which provides for the expiration of appropriations and their reversion to the Treasury applies to the funds involved in the unfair labor practice proceeding before the Board. It follows that the Agency's unobligated fiscal year 1982 funds remain available for obligation for the purpose of fulfilling any order of the Board arising from the unfair labor practice charge it is currently considering.

To the extent that the Agency has withdrawn part or all of these funds and allowed them to revert to the Treasury, 31 U.S.C. § 1552(a)(2) provides authority for the restoration of unobligated

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[3] The Post Office and Civil Service Committee report contained the word "automatically," whereas the Foreign Affairs Committee report did not.

[4] As we indicated above, we have been informed by the Agency that although $230,000 was included within the Agency's financial plan for fiscal year 1982 for Senior Foreign Service performance pay awards, almost the entire amount available for payroll purposes for fiscal year 1982, including this $230,000, was expended for other pay purposes. Only $1,324.34 which remained unobligated at the close of fiscal year 1982 remains available for performance pay awards.

balances needed to fulfill an order by the Board. The sum of $1,324.34 may accordingly be restored to the appropriate account.

[B-210967]

Appropriations—Availability—Travel, etc. Expenses—State Officials—Training Seminars, etc.

Use of appropriated funds by National Highway Traffic Safety Administration (NHTSA) to pay travel and lodging expenses of State officials to attend a proposed training workshop on odometer fraud is prohibited by 31 U.S.C. 1345 (formerly 551), as the proposed expenditures are not specifically provided for by the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1981 *et seq.* (1976), or other statute. Also, as this proposal is to be carried out by contract, the exception in our cases for grants does not apply. 35 Comp. Gen. 129 is distinguished.

Matter of: National Highway Traffic Safety Administration—Travel and Lodging Expenses, July 8, 1983:

The Chief Counsel of the National Highway Traffic Safety Administration (NHTSA) on behalf of the Administration has requested a decision on whether it has the authority to expend appropriated funds for lodging and transportation costs of State officials at a proposed odometer fraud workshop. For the following reasons, we conclude that such expenditures, are not authorized.

NHTSA has been delegated the responsibility for the enforcement of the Motor Vehicle Information and Cost Savings Act (Cost Savings Act), 15 U.S.C. § 1981 *et seq.* (1976), which prohibits odometer tampering on motor vehicles and establishes safeguards for the protection of the purchaser. The United States Attorney General or the chief law enforcement officer of the State in which a violation occurred may bring an action against violators. *See* 15 U.S.C. §§ 1990, 1990a.

In carrying out its responsibilities under the Cost Savings Act, NHTSA is interested in contracting with State motor vehicle departments to conduct odometer tampering detection workshops. The workshops would provide training to appropriate State officials in the detection, investigation and prosecution of odometer tamperers.

The Agency cites as authority to conduct the workshop the provisions of section 1990d of the Cost Savings Act. Section 1990d(a) provides in part:

> (1) The Secretary is authorized to conduct any inspection or investigation necessary to enforce this title or any rules, regulations, or orders issued thereunder. Information obtained indicating noncompliance with this title or any rules, regulations, or orders issued thereunder, may be referred to the Attorney General for investigative considerations. In making investigations under this paragraph, *the Secretary shall cooperate with appropriate State and local officials to the greatest extent possible consistent with the purposes of this subsection.* [Italic supplied.]

In order to make attendance at the workshop economically feasible for the State, the Agency would like to use the State workshop contracts to pay for the attendees' food and lodging. However, under

31 U.S.C. § 1345 (formerly § 551), such expenditures are prohibited unless specifically provided by law:

> § 1345. Expenses of meetings
> Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit—[exceptions not pertinent to this inquiry].

NHTSA argues that it has "specifically provided" authority under section 1990d of the Cost Savings Act, quoted above. We do not agree. General statutory language such as that contained in section 1990d does not even specifically authorize the agency to sponsor a meeting. The "cooperation" authority in section 1990d(a), relied on by NHTSA, appears to relate to the inspection and investigation of odometer tampering by State and local officials. Nevertheless, we think such meetings can be said to be reasonably related to the overall objectives of the statute. We reach that conclusion because we are not aware of any statutory prohibition against Federal sponsorship of such meetings. On the other hand, there is a statutory prohibition against paying the travel, transportation and subsistence expenses of non-Government attendees at a meeting. *See, e.g.,* B–193644, July 2, 1979; B–166506, July 15, 1975; and B–168627, May 26, 1970. By using the word "specifically" Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated. In other words, there is a distinction between the general authority to hold a conference and the specific authority to overcome the prohibition in 31 U.S.C. § 1345. Thus, in B–166506, cited above, we held that the Environmental Protection Agency (EPA) had authority under the Solid Waste Disposal Act, 42 U.S.C. § 3253 (1970), to hold a Solid Waste Management Convention but that payment for State officials' convention-related transportation and lodging was improper because these expenditures were not specifically authorized. Similarly, in B–193644, cited above, we determined that the Federal Coal Mine Health and Safety Act of 1969, as amended, authorized the Mine Safety and Health Administration, Department of Labor, to hold safety and health training seminars but without more specific statutory authority, the Agency could not pay for the travel and subsistence expenses of the attending miners and mine operators.

In only one case have we held that authority that did not specify travel or subsistence in its language satisfied the restrictions of 31 U.S.C. § 1345. In 35 Comp. Gen. 129 (1955) we allowed payment for the proposed transportation costs of invitees to a White House Conference on Education despite the absence of language mentioning such expenditures in the authorizing statute. In doing so, we noted that the entire purpose of the statute in question (the Act of July 26, 1954, 68 Stat. 532, 20 U.S.C. 331 note) was to provide for a White House Conference on Education. Further, we found that the

statute specified that the conference be "broadly representative of educators * * * from all parts of the Nation," and it authorized appropriations necessary for the "administration" of the Act. Since the conference was the only means of implementing the statute, we determined that payment of travel expenses was specifically authorized.

However, the justification found in 35 Comp. Gen. 129 does not apply here. As mentioned above, the Cost Savings Act is not designed for the purpose of holding workshops on odometer fraud, and the provision that NHTSA is relying on does not mandate that a conference be held. While we have no objection to agency sponsorship of the proposed odometer conference, lodging and transportation expenses are not essential for carrying out the purposes of the program. Accordingly, we conclude that in the absence of specific statutory authority, NHTSA's proposal would violate 31 U.S.C. § 1345.

The Chief Counsel, while anticipating our answer as to NHTSA's authority to contract for travel and lodging expenses, argues that this answer is without merit since it would not apply if the conference were conducted under a grant. The Chief Counsel, while recognizing that the NHTSA does not have grant authority, argues that application of different standards for grants and contracts is arbitrary. He suggests that procurement contracts should be subject to restrictions no greater than those imposed upon grantees. According to the Chief Counsel:

> The distinction between a grant and a contract is fictitious because ultimately the same result occurs, *i.e.*, government funds are used to pay for food and lodging. From a practical as well as a fiscal standpoint it would be beneficial to achieve this result through a contract which would provide greater government control and assure against misuse of funds.

We disagree with the Chief Counsel's view that there is no valid distinction between procurement contracts and grants. Real legal differences do result from issuing a grant rather than a procurement contract. One of the differences between grants and procurement contracts pertinent to this case is that in the case of a grant the responsibility for the grant program becomes that of the grantee rather than that of the Federal Government. Accordingly, a grantee is free to choose for itself the best means to implement the grant purpose, subject only to the applicable statutes and the terms of the grant agreement. In exercising that discretion, many restrictions that would apply to direct expenditures by the agency do not necessarily apply to grantees. *See, e.g.,* acquisition or use of aircraft, 55 Comp. Gen. 348 (1975); restrictions on dual compensation, 25 Comp. Gen. 868 (1946); restriction on payment of State sales tax, 37 Comp. Gen. 85 (1957). The general principal in all these cases is that grant funds lose their Federal character, once the award is made, and they become funds of the grantee, subject only to the terms of his grant document, the statute which authorized the grant, and applicable regulations. 36 Comp. Gen. 221, 224 (1956).

Accordingly, we do not agree that the distinction between a grant and contract is fictitious and reaffirm our earlier decisions to the extent they are based on those differences. If NHTSA considers the payment of State official's travel and lodging expenses to be essential to its mission, specific authorizing legislation should be sought from the Congress.

[B-211304]

Officers and Employees—Transfers—Real Estate Expenses—Loan Origination Fee

Employee may be reimbursed the loan origination fee he incurred incident to purchasing a house on December 1, 1982, at his new duty station since paragraph 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended, specifically authorizes reimbursement for such a fee. Revised FTR para. 2-6.2d represents a change from the predecessor regulations, as interpreted by decisions of this Office, in that it specifically allows reimbursement for a fee that may constitute a finance charge within the meaning of Regulation Z, 12 C.F.R. 226.4(a) (1982). Nevertheless, the revised regulation is consistent with the authorizing legislation in 5 U.S.C. 5724a(a)(4) (1976), and, therefore, will be followed by this Office.

Matter of: Robert E. Kigerl—Loan Origination Fee, July 12, 1983:

This decision is in response to a request for an advance decision submitted by Mr. Harold T. Ownby, an authorized certifying officer of the General Accounting Office, concerning reimbursement of a $725 loan origination fee paid by Mr. Robert E. Kigerl in connection with the purchase of a residence at his new duty station. We hold that the amount in question may be certified for payment since paragraph 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended by GSA Bulletin FPMR A-40, General, Supplement 4, October 1, 1982, specifically authorizes reimbursement for loan origination fees.

By travel order dated October 8, 1982, Mr. Kigerl was authorized reimbursement of relocation expenses associated with his transfer from Albany, New York, to Eglin Air Force Base, Florida. On December 1, 1982, he settled on the purchase of a residence at his new duty station, and subsequently claimed reimbursement for various closing costs, including a lump-sum loan origination fee in the amount of $725. The certifying officer withheld reimbursement for the loan origination fee, questioning whether such a fee could be paid under FTR para. 2-6.2d, which was revised in October 1982, to expressly allow reimbursement of loan origination fees, while still generally disallowing reimbursement of finance charges. Specifically, he states that the authorization for reimbursement of loan origination fees contained in revised FTR para. 2-6.2d appears to conflict with our decisions under the predecessor regulation, in which we held that a lump-sum loan origination fee is not reimbursable since it constitutes a finance charge within the meaning of the Truth in Lending Act, Title I, Public Law 90-321 (TILA), as amend-

ed, 15 U.S.C. § 1601, *et seq.* (1976), and the implementing provisions of Regulation Z, 12 C.F.R. § 226.4 (1982). In the event that we decide that a loan origination fee is reimbursable under FTR para. 2-6.2d, the certifying officer has asked us to determine under FTR para. 2-6.2d(1)(f) which other real estate expenses constituting part of the finance charge under Regulation Z are reimbursable as items "similar in nature" to loan origination fees and other expenses specifically authorized in FTR para. 2-6.2d(1) (a-e).

Under 5 U.S.C. § 5724a(a)(4) (1976), an employee may be reimbursed for the expenses he incurs in selling and/or purchasing a residence pursuant to a permanent change of station. The provisions of FTR para. 2-6.2d delineate the miscellaneous real estate expenses for which a transferred employee may be reimbursed.

Prior to its revision in October 1982, FTR para. 2-6.2d prohibited reimbursement for any real estate expense which was determined to constitute a finance charge within the meaning of the TILA, specifically 15 U.S.C. § 1605, as implemented by Regulation Z. The primary purpose of the TILA is to assure a meaningful disclosure of credit terms so that a consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. See 15 U.S.C. § 1601. Therefore, the finance charge is defined so as to distinguish between charges imposed as part of the cost of obtaining credit and charges imposed for services rendered in connection with a purchase or sale regardless of whether credit is sought or obtained.

The relevant part of Regulation Z expressly categorizes service charges and loan fees as part of the finance charge when they are imposed incident to or as a condition of the extension of credit. Since a loan origination fee generally is assessed on a percentage rate basis for the purpose of defraying a lender's administrative costs, we have stated that the fee is imposed, "incident to * * * the extension of credit," and therefore constitutes a finance charge under Regulation Z. See *Stanley Keer,* B-203630, March 9, 1982. Thus, under the prior provisions of FTR para. 2-6.2d, we disallowed reimbursement for a loan origination fee, unless the fee was broken down into specific charges which were excludable from the definition of a finance charge by 12 C.F.R. § 226.4(e). See *Keer,* above.

The revised provisions of FTR para. 2-6.2d specifically authorize reimbursement for loan origination fees, providing in relevant part as follows:

> d. *Miscellaneous expenses.*
> (1) *Reimbursable items.* The expenses listed below are reimbursable in connection with the sale and/or purchase of a residence, provided they are customarily paid by the seller of a residence in the locality of the old official station or by the purchaser of a residence at the new official station to the extent they do not exceed amounts customarily paid in the locality of the residence.
> (a) FHA or VA fee for loan application;
> (b) *Loan origination fee;*
> (c) Cost of preparing credit reports;

(d) Mortgage and transfer taxes;
(e) State revenue stamps;
(f) Other fees and charges similar in nature to those listed above, unless specifically prohibited in (2), below;

* * * * * * *

(2) *Nonreimbursable items.* Except as otherwise provided in (1), above, the following items of expense are not reimbursable:

* * * * * * *

(e) *No fee, cost, charge, or expense determined to be part of the finance charge under the Truth in Lending Act, Title I, Pub. L. 90-321, and Regulation Z issued in accordance with Pub. L. 90-321 by the Board of Governors of the Federal Reserve System, unless specifically authorized in (1), above* * * *. [*Italic supplied.*]

As pointed out by the certifying officer, the revised regulation represents a departure from the prior provisions of FTR 2-6.2d, as interpreted by decisions of this Office, in that it allows reimbursement for a loan origination fee even though that fee may constitute a finance charge within the meaning of Regulation Z. That departure, however, is not inconsistent with the authorizing legislation in 5 U.S.C. § 5724a(a)(4), since the statute does not, by its own terms, prohibit reimbursement of real estate expenses which are determined to constitute a finance charge within the meaning of Regulation Z. Rather, the prohibition against reimbursement of fees constituting part of the finance charge under Regulation Z originally was established by the Office of Management and Budget (OMB) in section 4.2d of OMB Circular No. A-56 (June 1969), pursuant to the President's authority under 5 U.S.C. § 5724a to administer the relocation expense provisions contained therein. By Executive Order 11609, 36 Fed. Reg. 13,747 (1971), as amended, the President delegated his authority under section 5724a to the Administrator of General Services. Pursuant to that authority, the General Services Administration (GSA) promulgated the May 1973 version of the FTR, paragraph 2-6.2d of which continued to disallow reimbursement for any real estate expense determined to constitute a finance charge within the meaning of the TILA, as implemented by Regulation Z. Under the same authority, GSA may now authorize reimbursement of a loan origination fee, even though that fee constitutes a finance charge under Regulation Z.

In this regard, it should be noted that our decisions concerning the reimbursability of loan origination fees have been based on, and have not prescribed rules independent of, the successive regulations implementing 5 U.S.C. § 5724a(a)(4). Thus, we previously allowed reimbursement for loan origination fees based on section 4.2d of Bureau of the Budget Circular No. A-56 (October 1966), which was promulgated prior to enactment of the TILA and specifically authorized reimbursement for loan origination fees. 47 Comp. Gen. 213 (1967). Subsequently, we disallowed reimbursement for loan origination fees when section 4.2d of OMB Circular No. A-56 was revised in June 1969 to remove those fees from the listing of reimbursable expenses and to prohibit reimbursement for any ex-

pense determined to constitute a finance charge within the purview of the TILA. See B-168513, December 29, 1969. As noted previously, we continued to disallow reimbursement for loan origination fees under FTR para. 2-6.2d, which prohibited reimbursement for any item found to constitute a finance charge under the TILA, as implemented by Regulation Z. See *Keer,* above.

Since our determinations whether or not to allow reimbursement for loan origination fees have depended on the regulations then in effect, and have not established rules independent of those regulations, it cannot be said that the revised provisions of FTR para. 2-6.2d "conflict" with our prior decisions denying reimbursement for loan origination fees. Accordingly, based on the specific authorization contained in FTR para. 2-6.2d, as amended, we hold that Mr. Kigerl may be reimbursed the $725 loan origination fee he incurred in connection with his purchase of a residence at his new duty station.

Additionally, the certifying officer has asked us to list real estate expenses constituting part of the finance charge under Regulation Z which may be reimbursed as "charges similar in nature" to loan origination fees and other expenses specifically authorized in FTR para. 2-6.2d(1)(a-e). Under FTR para. 2-6.2d, fees and charges which are regarded as similar to the expenses for which reimbursement is specifically authorized in FTR 2-6.2d(1) may be reimbursed only if such expenses do not constitute a finance charge within the meaning of the TILA, as implemented by Regulation Z. FTR para. 2-6.2d(2)(e). Accordingly, in determining whether or not an item of real estate expense not specifically listed in FTR para. 2-6.2d(1) is reimbursable under that provision as a similar fee or charge, the particular item must be examined in light of Regulation Z and decisions of this Office. Because the terminology used in characterizing real estate expenses varies so greatly from one part of the country to another, we do not believe that we should attempt to list the expenses that would fall within the catch-all provision discussed above. Each expense must be individually examined in the manner described.

For the reasons stated above, the $725 loan origination fee claimed by Mr. Kigerl may be certified for payment.

[B-207732]

General Accounting Office—Jurisdiction—Labor-Management Relations—Requests For Decisions—Declined

Under 4 C.F.R. 22.8 (1983) General Accounting Office (GAO) will not take jurisdiction over a labor-management matter which is "unduly speculative or otherwise not appropriate for decision." Since this case is based on factual issues which are irreconcilably in dispute, it would be more appropriately resolved through the grievance procedures set forth in the parties' negotiated labor-management agreement, or through negotiation. Therefore, under 4 C.F.R. 22.8, GAO will exercise its discretion to decline jurisdiction in this matter.

Matter of: Bureau of Engraving and Printing—Paid Lunch Periods—GAO Jurisdiction—Labor Management Factual Dispute, July 13, 1983:

The Department of the Treasury has asked us whether it may discontinue the longstanding practice at the Bureau of Engraving and Printing (BEP) and the Bureau of the Mint (Mint) of providing employees with a paid one-half hour lunch period during each 8-hour workday, in light of certain alleged changes in the working conditions at those agenices. However, since this case involves issues which would be more appropriately resolved through labor-managment negotiations or through grievance and arbitration procedures, we decline to take jurisdiction over this matter. Furthermore, since the basic factual issues underlying this case are irreconcilably in dispute in the record before us, not only between management and the unions, but among different offices within the Department itself, the matter is not appropriate for a decision by our Office on the merits.

This decision is in response to a letter from Mr. Peter J. Wallison, General Counsel of the Department of the Treasury, requesting a review of our prior decision, B-56940, May 1, 1946, which authorized BEP and the Mint to provide their employees with a paid one-half hour lunch period. We upheld the paid lunch practice in that decision in light of the security requirement that employees associated with the production of money and stamps generally be restricted to their work areas throughout the workday, and because the employees were required to remain on call during their lunch periods to ensure the continuous operation of the production machinery. In light of such restrictions, we held that the half-hour lunch beriod designated for BEP and Mint employees reasonably could be viewed as time given by the employees for the benefit of the employer, and, thus, was compensable time.

The Treasury Department's decision to provide paid lunch periods for BEP and Mint employees has been questioned a number of times, both inside the Department and by our Office, since our initial authorization of the practice in 1946. In such cases, the validity of the practice has always been upheld. See B-56940-O.M., August 12, 1952, and 44 Comp. Gen. 195 (1964). Additionally, we note that the paid lunch period has existed at the BEP since 1862.

Now, however, Treasury is seriously questioning the propriety of continuing the paid lunch practice currently in effect at BEP and the Mint. The Department has specifically requested that we review our earlier decision in B-56940, May 1, 1946, "To determine whether changed conditions have affected the permissibility of the paid lunch practice."

The Department has apparently taken the position that the conditions of employment at BEP and the Mint have changed so substantially since the time of our prior decision that paid lunch peri-

ods no longer can be justified. In support of this position, Treasury has provided us with a number of documents discussing the current working conditions at the two Bureaus. In particular, it has submitted data from two recent Treasury Department studies—a Personnel Management Evaluation (PME) issued in February 1979, and a survey conducted by the Office of Audit and Internal Affairs at the request of the Inspector General in June 1981—both of which suggest that working conditions have changed dramatically at BEP and the Mint since the time of our 1946 decision.

The Personnel Management Evaluation team concluded, in part, that BEP has greatly relaxed its previously strict prohibition on employees leaving the premises at lunch, and that the agency no longer requires employees to perform stand-by duty during lunchtime. The Audit of the BEP for the Inspector General generally confirmed the findings of the PME team. The audit report specifically stated that all BEP employees are normally given a work-free lunch period of 30 minutes, during which time they are generally free to enter all designated luncheon areas on Bureau premises. It also asserted that very few employees are required to perform work during their lunch periods, and that even those employees are subject to call only on an infrequent basis. Finally, the report stated that responsibility for product security now rests on only a few employees, "in marked contrast to conditions indicated in 1946 and 1952 when all production employees apparently remained in work areas while eating lunch to personally safeguard Bureau securities."

Treasury did acknowledge in its submission that BEP strongly disagrees with the Treasury's position in this matter. Correspondence from the Director of the BEP, Harry R. Clements, which was contained in Treasury's submission to our Office, made numerous factual allegations which are in disagreement with the facts as determined through the Personnel Management Evaluation and the subsequent audit. The BEP generally maintains that the conditions of employment at BEP, in particular the amount of freedom enjoyed by its employees at lunchtime, have changed little since the time of our prior decisions.

Specifically, the BEP has asserted that its employees are at all times still greatly restricted in their movements within the building, and are rarely given permission to leave the premises at noon. In addition, BEP maintains that because of production needs, employees do perform needed work during luncheon periods and are at all times subject to recall if the work load dictates. In light of these ongoing restrictions placed on BEP employees, the Director of the BEP has strongly disputed the Treasury's contention that BEP employees no longer are giving their luncheon time for the benefit of their employer, and, thus, no longer are entitled to paid lunch periods.

In addition to this factual dispute, in early December 1982, we learned that the Department had never served any of the unions representing BEP or Mint employees with copies of its submission to our Office in regard to this matter. Once we learned that 18 unions (all representing BEP employees) were interested in the case before us, we sent them copies of the Treasury's submission and agreed to consider their written responses, provided that they were submitted within a designated time period, as authorized by 4 C.F.R. § 22.4 (1982). We received timely responses on behalf of all 18 unions in January 1983.

The unions' comments strongly support the position taken earlier by the Director of the BEP, that the current conditions of employment at BEP are substantially the same as they were when our decision B-56940 was originally issued, and thus justify continuation of the paid lunch practice at that agency.

In addition, the unions have taken issue with a recent decision by the United States Treasurer, directing BEP to implement an unpaid lunch policy for selected groups of employees. This change primarily affected supervisory and non-bargaining unit personnel. In December 1982, in an attempt to block implementation of the directive, one union filed an unfair labor practice (ULP) with the Federal Labor Relations Authority. This ULP, however, has since been withdrawn, and the unpaid lunch policy for supervisory personnel went into effect on January 9, 1983, as scheduled.

The Joint Council of Unions at BEP has also presented an additional argument in favor of continuing paid lunch periods. It asserts that in light of the longevity of the paid lunch practice, and its incorporation into collective bargaining agreements governing BEP employees, the agency is now required to continue the paid lunch policy under the terms of the negotiated collective bargaining agreements which cover 90 percent of the BEP's work force.

Finally, although discontinuance of the paid lunch practice would affect both BEP and Mint employees, Treasury appears to have collected little data concerning current working conditions at the various Mint offices throughout the country. Although the Treasury attempted to survey the working conditions of Mint employees in April 1981, that survey did not yield conclusive results. The responses of the Mint section chiefs were often directed toward the potential labor-management problems which might result from discontinuing paid lunch periods for Mint employees, rather than discussing the actual status and responsibilities of employees during their lunch periods. In addition, the factual information that was gathered was often conflicting. For example, some reports indicated that certain Mint employees were allowed to eat lunch in a nonstandby status, free of any work obligation except to report back at a specified time to resume work, while other responses pointed to employees who were required to perform substantial duties during the course of their lunch periods. In sum, the facts gathered

through the Mint survey are both incomplete and inconsistent, and, therefore, cannot form a basis for any reasonable conclusion as to the current conditions of employment within the Mint.

Our procedures governing decisions on matters concerning appropriated fund expenditures which are of mutual concern to agencies and labor organizations are contained in 4 C.F.R. Part 22 (1983). Section 22.8 of those procedures provides that we will not issue a decision on any matter which we find to be "unduly speculative or otherwise not appropriate for decision."

In light of the provisions of 4 C.F.R. § 22.8, we decline to issue a decision on the merits of this case. The main issue to be resolved here is primarily factual in nature—whether the conditions of employment at BEP and the Mint have changed so substantially since our 1946 decision, B-56940, that the paid lunch practice no longer can be justified. This question cannot be resolved until a clear picture can be developed concerning the present working conditions at the BEP and the Mint.

The basic facts here are confused. Treasury's position that working conditions at the two Bureaus have changed significantly in recent years has been challenged not only by the unions representing aggrieved employees, but also by agency management itself, specifically by the Director of the BEP. The factual accounts offered by the various parties to this case concerning the present conditions at BEP are substantially different and often conflicting. On the basis of the record before us, we cannot say with any certainty what the current working conditions are at the BEP and the Mint and, therefore, we cannot say whether any changes in working conditions that may have occurred are sufficient to justify a retreat from paid lunch periods.

In light of the inconsistency and insufficiency of the facts before us, we are unable to satisfactorily resolve the factual conflicts and, therefore, the matter is not appropriate for the issuance of a decision on the merits by our Office under the provisions of 4 C.F.R. § 22.8.

Furthermore, since this case directly concerns the conditions and hours of employment of certain Treasury employees, and the outcome may affect certain entitlements that were bargained for in the collective bargaining process, we believe that this matter would be more properly resolved through grievance procedures or through negotiation.

Finally, we are also reluctant to assert jurisdiction in this matter in light of several labor-management problems that have arisen in connection with this case. The Treasury Department did not serve all of the unions representing employees concerned with the proposed change in policy with a copy of its request for decision, as required by 4 C.F.R. § 22.4, governing labor relations cases before this Office. Because of this failure to serve, and because we have not received comments from any unions representing Mint employ-

ees, we do not know whether the unions representing those employees have actual knowledge that this matter is now pending. The agency, through its inaction, thus, may have effectively denied an employee group of its right, under Part 22 of our regulations, to comment on an agency request for a decision.

In addition, we note that although the ULP filed by the craft supervisor's union in December 1982 has since been withdrawn, the agency filed a second ULP in regard to this matter in January 1983, charging that both NTEU and AFGE have refused to enter into collective bargaining procedures at the end of the stated contract term, in violation of provisions of the collective bargaining agreement. We understand that this ULP is currently pending before the FLRA.

In conclusion, in light of the irreconcilable factual dispute, we decline to issue a decision on the merits of this case, in accordance with the jurisdictional limits set forth in 4 C.F.R. § 22.8.

[B-208720.2]

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc. Determinations—Prospective Wage Rate Increases—Ceiling Provision

GAO has no objection to ceiling provision in escalation clause providing for prices to be adjusted at the beginning of each option period to reflect changes in the Service Contract Act determinations since use of such a provision appears to be a reasonable exercise of contracting officer's authority.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Solicitation Improprieties—Apparent Prior To Bid Opening/Closing Date for Proposals

Protest filed well after bid opening, objecting to the agency's failure to postpone bid opening to allow protester to assess the impact of an amendment to the solicitation, is untimely.

Matter of: Echelon Service Company, July 13, 1983:

Echelon Service Company protests invitation for bids (IFB) No. GS-11C-20229 issued by the General Services Administration for security guard services at two locations in Washington, D.C. The protester contends that a limitation in the solicitation on prices for the option years imposes an unfair burden on small business contractors. Echelon also protests the agency's failure to extend the time for bid opening when the price limitation was amended. The protest is denied in part and dismissed in part as untimely.

The solicitation, which was set aside totally for small businesses, required bidders to quote prices per month for providing guard services for a 12-month base period and for each of two 12-month option periods. Bidders were also required to quote prices per man-hour for providing additional services. The solicitation stated that the contract would be subject to the Service Contract Act of 1965,

as amended, 41 U.S.C. § 351 *et seq.* (1976), which provides that every Government contract for the furnishing of services in excess of $2,500 must require the contractor to pay service employees at a rate not less than the rate prevailing for such employees in the locality, as determined by the Secretary of Labor. The solicitation provided further that in the absence of a wage determination by the Secretary the minimum wage established under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1976), would apply. An escalation clause in the solicitation provided that the monthly or hourly prices would be adjusted at the beginning of each option period, according to a stated formula, to allow for any change in the wage determination, but that the escalated prices for each option period could not exceed the contract prices for the preceding 12-month period by more than 10 percent. The escalation clause required bidders to warrant that the prices submitted for the option periods did not include any allowances to cover increases in costs for which the escalation clause provided an adjustment.

Prior to bid opening, Echelon filed a protest with this Office complaining that the 10 percent limitation on the increase in the option year contract prices, coupled with the warranty against allowances for increased costs for which an adjustment was provided, exposed prospective contractors to the risk that they might not be able to recover all of the increases in wages that might be required under the Service Contract Act. The day before bid opening, apparently in response to similar protests filed by others but subsequently withdrawn, the agency issued an amendment to the solicitation increasing the option year ceiling from 10 to 15 percent. The protester concedes this amendment reduced, at least partially, the risk imposed on prospective contractors, but, because it received the amendment only hours prior to bid opening, the protester contends that it did not have an adequate opportunity even to consider whether to submit a bid and withdraw its protest. Therefore, the protester did not submit a bid in response to the solicitation as amended. Rather, several days after bid opening, the protester filed an additional protest contesting the contracting officer's failure to postpone bid opening to allow bidders to reconsider their bids in light of the amendment.

The regulations require a contracting officer to include a standard price adjustment clause in fixed-price service contracts that contain options to renew and are subject to the Service Contract Act. Federal Procurement Regulations (FPR) § 1-12.904-3(c). The standard clause reads, in part, as follows:

(c) The contract price of contract unit price labor rates for the option or renewal periods of this contract will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that these increases or decreases are made to comply with:

(i) The Department of Labor determination of minimum prevailing wages and fringe benefits applicable at the beginning of the option or renewal period, or

(ii) An amendment to the Fair Labor Standards Act enacted after the award of this contract, affecting the minimum wage, that becomes applicable to this contract under law prior to an option or renewal period.

Any adjustment will be limited to increases or decreases in wages or fringe benefits as described above, and the accompanying increases or decreases in social security and unemployment taxes and workmen's compensation insurance, but shall not otherwise include any amount for general and administrative costs, overhead, or profits.

Paragraph (a) of the regulation states that the purpose of the standard clause is "to permit adjustment of service contract prices for option years * * * so as to eliminate the need for contractors to include contingency allowances in the prices for these periods." The regulation permits a contracting officer to develop alternative price adjustment clauses that accomplish "essentially the same purpose" as the standard clause.

The solicitation in this case did not contain the standard price adjustment clause, but rather a clause that the agency says accomplishes essentially the same purpose as the standard clause. The amended solicitation provided that the prices for each option period could not exceed the contract prices for the preceding 12-month period by more than 15 percent. The agency states that this ceiling is based on the contracting officer's best estimate of the expected increases in the Service Contract Act wage determination. The agency justifies use of this price adjustment limitation by stating that it is intended to combat the excessive wage escalation that is the by-product of the Service Contract Act. That Act was intended to eliminate wage busting, the practice of proposing to hire and actually hiring a predecessor contractor's employees at reduced wages and fringe benefits in order to be the low bidder on a Government service contract. The agency notes that while the Act may have eliminated wage busting, one result of the Act is that contractors have little incentive to bargain over increases in wage rates that are simply passed through to the Government.

The agency notes further that the warranty against allowances for increased costs expressly applies only to those increased costs for which an adjustment is provided. It states that there was nothing in the solicitation to preclude bidders from pricing any contingency not provided for in the escalation clause, and that if a bidder thought that the 15 percent ceiling was inadequate to cover its costs, the bidder could develop a monthly rate to plan for that perceived risk. The agency adds that competitive market forces would tend to keep such contingency allowances to a minimum.

We find no reason to object to the 15 percent ceiling contained in the escalation clause of the solicitation. Both the clause and the regulation upon which it is based reflect a policy determination to pass through to the Government the effects of changes in the wage determinations applicable to the option periods. The ceiling provision obviously places a possible limitation on a total pass-through. However, the regulation provides for the use of alternative provi-

sions, and in the absence of any statutory or regulatory requirement that changes in wage determinations be passed through to the Government in full, we think the escalation clause used here represents a reasonable exercise of the contracting officer's discretion to develop alternative clauses. We also note that the ceiling apparently had little adverse impact on competition as the agency reports that seven bids were received in response to the IFB.

The protester's other contention, regarding the contracting officer's failure to extend the time set for bid opening when the price adjustment ceiling was raised from 10 to 15 percent, is untimely. This alleged impropriety was apparent from the face of the solicitation as amended; therefore, any protest on this point should have been filed (received) prior to bid opening or as soon thereafter as possible. Because the protest on this issue was filed several days after bid opening, it is untimely and will not be considered. *X-Tyal International Corp.,* B-202100, March 25, 1981, 81-1 CPD 224.

The protest is denied in part and dismissed in part.

[B-208908]

Leaves of Absence—Annual—Accrual—Employees "Stationed" Outside United States—Recruited Overseas

Employee of Department of Agriculture's Food and Nutrition Service was recruited from her place of permanent residence in the continental United States for assignment in Puerto Rico. Thus, she is eligible to accrue the 45 days of annual leave authorized by 5 U.S.C. 6304(b)(1) for individuals recruited or transferred from the United States or its territories or possessions for employment outside the area of recruitment or from which transferred.

Officers and Employees—Overseas—Home Leave—Entitlement

Employee who qualifies for maximum annual leave accumulation of 45 days under 5 U.S.C. 6304(b)(1) and has completed a basic period of 24 months continuous service abroad is entitled to accrue home leave under 5 U.S.C. 6305(a) on the basis of her continuous service. Although rate at which employee earned home leave was subject to agency interpretation of implementing regulations at 5 C.F.R. 630.604, agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted.

Travel Expenses—Overseas Employees—Renewal Agreement Travel

Employee recruited from her place of actual residence in the continental United States for assignment in Puerto Rico and who meets all of the eligibility requirements under 5 U.S.C. 5728(a) is entitled to tour renewal agreement travel. An agency cannot defeat an employee's travel entitlement under section 5728(a) by refusing to negotiate a renewal agreement where the particular position could have been filled locally because payment of renewal agreement travel expenses to an employee who meets all of the eligibility requirements is mandatory rather than discretionary with the employing agency.

Leaves of Absence—Annual—Accrual—Employees "Stationed" Outside United States—Recruited Overseas

Agency policy, which purports to deny 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruit-

ed from places of actual residence in continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements.

Matter of: Estelle C. Maldonado—Home Leave—Tour Renewal Agreement Travel—Overseas Employment—Place of Actual Residence, July 13, 1983:

In this decision, we hold that Ms. Estelle C. Maldonado, an employee of the Department of Agriculture's Food and Nutrition Service, is entitled to accumulate 45 days of annual leave under 5 U.S.C. § 6304(b) and to accrue home leave under 5 U.S.C. § 6305(a). Moreover, Ms. Maldonado is entitled to renewal agreement travel expenses under 5 U.S.C. § 5728(a) covering a round trip by her and her family between her official duty station in San Juan, Puerto Rico, and her place of actual residence in the continental (conterminous) United States, even though she was not required to execute the agency's 2-year overseas employment agreement when first assigned to Puerto Rico.

We also find improper the agency's policy that differentiates between "rotational assignments" and "permanent assignments" in the recruitment of employees from positions in the continental (conterminous) United States for placement in positions located in Puerto Rico.

BACKGROUND

Ms. Maldonado was born, raised, educated, married, and raised her family in New York, New York. In 1961 she commenced her employment with the United States Department of Agriculture (USDA or agency) in New York where she worked until October 1, 1973, when she was transferred to Hyattsville, Maryland, in a reduction in force action. Just 7 months later, she became aware of her agency's decision to open a field office in San Juan, Puerto Rico. She expressed an interest in reassignment and was selected for assignment to the position of Food Program Specialist in the San Juan, Puerto Rico, field office.

On May 24, 1974, Ms. Maldonado signed a transportation agreement incident to her transfer to Puerto Rico by which she agreed to remain in the employ of the Federal Government for a period of 12 months in return for the agency's payment of her transportation and travel expenses.

Effective July 7, 1974, Ms. Maldonado transferred to Puerto Rico. At that time, because her family had never joined her at the Hyattsville, Maryland duty station, but had remained at the family's actual residence in New York, New York, Ms. Maldonado was authorized to ship household goods from both her actual residence in New York and her dwelling place at the Hyattsville duty station.

In 1978, after 4 years of service in Puerto Rico, Ms. Maldonado became aware of the fact that some employees assigned to duty in Puerto Rico were accruing and taking home leave. In 1979, Ms. Maldonado filed a claim for home leave and 45-day annual leave accrual with her agency. Her agency denied her claim on the basis of the agency's policy as set forth in its personnel manual that home leave was permitted only to those employees on "two-year rotational assignments" to Puerto Rico. Subsequently, on September 1, 1981, Ms. Maldonado presented her claim to this Office.

THE AGENCY'S POLICY

Numerous agency documents contained in the administrative record indicate that only employees on "rotational assignments" in Puerto Rico are eligible for home leave. For example, a letter dated March 27, 1979, from the Personnel Officer of the agency's Mid-Atlantic Regional Office, informed Ms. Maldonado that home leave may be granted to an employee during a period of service abroad when it is contemplated that he or she will return immediately or upon completion of an assignment, but, "service based on a permanent position in the Commonwealth of Puerto Rico is not considered service abroad." Similarly, a letter dated July 16, 1979, from the Acting Director of Personnel for the Department of Agriculture to the Director of Personnel for the Food and Nutrition Service, confirms the agency's policy that home leave is granted only to employees on "rotational assignments." This letter further explains that where employees are recruited in the United States and sent to Puerto Rico for 2-year assignments, and where these employees agree at the end of the 2-year assignment to return to Puerto Rico for another 2-year assignment, home leave is granted.

In further developing Ms. Maldonado's claim our Claims Group presented a series of specific questions to the agency concerning Ms. Maldonado's assignment in Puerto Rico. Pertinent extracts from the agency's formal response—including the question presented by the Claims Group as underscored followed by the agency's response—are presented below:

3. *What type of positions are filled under rotational assigments?*

These should be the positions which duties require an employee to return to the United States or rotate between areas. The Food and Nutrition Service has at least two other employees in our Puerto Rico field office who were recruited from the United States. None of the positions they occupy require them to return to the United States or rotate. They are all on permanent assignments. Therefore, we did not enter into a rotational assignment agreement with these employees. The positions could have been filled locally.

6. *Does Ms. Maldonado have an entitlement to transportation expenses if she ever decides to return to the United States?*

Ms. Maldonodo would not be entitled to transportation expenses if she were to return to the United States because an agreement was not signed and there was no time limit set for her appointment. Section 5728(a) or FPM Supplement 990-1 says that the agency shall pay the expenses of round trip travel of an employee from his post of duty outside the continential [sic] United States to the place of his actual residence "after he has satisfactorily completed an agreed period of service outside

the continential [sic] United States and is returning to his actual place of residence to take leave before serving another tour of duty . . . under a new written agreement . . ." * * * There were no agreements signed in Ms. Maldonado's case. If Ms. Maldonado later on applies and is selected for another position which requires relocation, then entitlement to transportation expenses will be considered at that time.

Under the policy outlined above the agency allows home leave and return transportation to the United States to be granted only to those employees serving abroad on 2-year rotational assignments and does not allow such benefits to employees serving on permanent assignments in Puerto Rico.

In view of the apparent confusion that exists in the agency as to employees' rights on transfers to positions outside the continental United States we will discuss in this decision three basic statutory provisions: (1) 45 days' annual leave accumulation, (2) accrual and granting of home leave, and (3) travel and transportation.

STATUTORY ENTITLEMENTS

I. 45 Days Annual Leave Accumulation

Section 6304 of title 5, United States Code, permits Ms. Maldonado to accumulate 45 days of leave if it is determined that she has an actual place of residence in the United States, its territories or possessions other than Puerto Rico. Specifically, subsection (b)(1) of the statute provides for the accumulation of 45 days annual leave to:

(1) Individuals directly recruited or transferred by the Government of the United States from the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment or from which transferred.

As a result, an employee's entitlement to 45 days' annual leave accumulation is contingent upon the agency's independent determination as to actual place of residence. In Ms. Maldonado's case, the record shows that she was recruited from the continental (conterminous) United States—wherein New York was her actual place of residence—for assignment in Puerto Rico in May 1974. There is no evidence that she changed her permanent residence to any point in Puerto Rico that would void coverage under the statute, and accordingly, we know of no legal basis for precluding her accumulation of the additional amount of leave provided by 5 U.S.C. § 6304(b)(1). Compare 48 Comp. Gen. 437 (1968).

II. Home Leave

Essentially, both the accrual and the granting of home leave are provided for under 5 U.S.C. § 6305(a) and the regulations promulgated by OPM in 5 C.F.R. §§ 630.601-607. Those regulations provide for the accrual of home leave in appropriate amounts for employees who are assigned to overseas posts at which home leave may be earned. However, an employee's accrual of home leave must be distinguished from the agency's discretionary authority to grant home leave. An agency may grant home leave in combination with other

leaves of absence in accordance with established agency policy. 5 C.F.R. § 630.606(b). Thus, this Office has consistently held that the determination as to when and in what amount home leave will be granted is a matter for administrative determination. See for example 37 Comp. Gen. 848 (1958); 35 *id.* 101 (1955).

Section 6305(a) of title 5, United States Code, provides that:

> (a) After 24 months of continuous service outside the United States, an employee may be granted leave of absence, under regulations of the President, at a rate not to exceed 1 week for each 4 months of that service without regard to other leave provided by this subchapter. Leave so granted—
>
> (1) is for use in the United States, or if the employee's place of residence is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico.* * *

The OPM regulations provide under section 630.602 of title 5, Code of Federal Regulations, that an employee "who meets the requirements of section 6304(b) of title 5, United States Code, for the accumulation of a maximum of 45 days of annual leave earns and may be granted home leave in accordance with section 6305(a) of that title and this subpart." An agency, however, may grant home leave only "when it is contemplated that he will return to service abroad immediately or on completion of an assignment in the United States." 5 C.F.R. § 630.606(c)(2). Earning rates are set out under section 630.604 of the regulations.

The agency maintains that section 630.604(a)(1) allows home leave to be granted at a 15-day earning rate only to those employees who are working abroad on rotational assignments. We do not disagree with that conclusion. However, we do not concur with the agency's assessment that failure to qualify for the 15-day home leave earning rate carries with it the extinction of home leave accrual at the lesser earning rates specified in the regulations. Ms. Maldonado had the right under 5 U.S.C. § 6305(a), incident to her continuous overseas employment after May 1974, to accrue home leave under the earning provisions of 5 C.F.R. § 630.604.

As indicated above, however, an agency has discretion as to whether to allow home leave. Moreover it is not completion of an assignment but rather contemplation of another period of duty abroad that is required for authorized home leave. *Lamoyne J. DeLille,* 56 Comp. Gen. 824 (1977); see also *Paul Peter Woronecki,* B-192199, January 31, 1979.

In Ms. Maldonado's case it is obvious that her continued service abroad in Puerto Rico was required from and after May 1974. As a result, although the granting of home leave and the rate authorized is basically for each agency's determination, the refusal to consider such a request from an employee entitled to accrue home leave based on lack of a 2-year rotational assignment was legally in error.

III. Overseas Tour Return Travel Rights, Including Renewal Agreement Travel

It is important to understand that home leave and return travel from areas outside the United States, including return for separation, and tour renewal agreement travel are independent entitlements that are often provided coincidently to a qualifying employee returning to the continental United States—but these entitlements do not depend one upon the other. Thus, reimbursement for the expenses of travel under the authority of 5 U.S.C. §§ 5722, 5724(d) and 5728 are not necessarily dependent upon the granting of home leave under 5 U.S.C. § 6305.

Travel and transportation expenses incident to a transfer outside the United States are governed by 5 U.S.C. § 5724(d), and paragraph 2-1.5 of the FTR which require an agreement for a minimum 1-year of Government service. In case of a violation of the agreement the employee is indebted for the expenses. If the agreed service period is satisfied and the employee is still stationed outside the continental United States he is entitled to return travel to the United States upon separation for whatever reason, personal or otherwise. Thus, the 1-year agreement with the agency signed by Ms. Maldonado entitled her to return travel to place of residence in the United States upon separation.

Travel and transportation expenses incident to home leave—like those same round-trip travel expenses for employees taking vacation leave in connection with tour renewal agreements—are provided under the following authority in 5 U.S.C. § 5728:

> (a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty.

These provisions are intended to provide expenses of round-trip travel and transportation for civilian Government employees and their families between tours of duty overseas for the purpose of taking leave. 49 Comp. Gen. 596 (1970) and 37 *id.* 848, *supra;* see also *Dick D. Hendricks,* B-205137, May 18, 1982, citing B-131459, May 6, 1957.

When Ms. Maldonado was recruited for assignment to Puerto Rico she was not required to execute the agency's 2-year overseas employment agreement. Although the agency states that some employees assigned to Puerto Rico were required to sign overseas employment agreements for tours of 24 months, other employees, including Ms. Maldonado, executed only a standard form service agreement by which they agreed to a 12-month Government service requirement. As indicated in the factual presentation of Ms. Mal-

donado's case, the agency characterized her assignment in Puerto Rico as a permanent transfer and determined she was ineligible for home leave and tour renewal travel. The agency also reported that it did not enter into rotational assignment agreements (overseas employment agreements) with employees such as Ms. Maldonado because her position was permanent and could have been filled locally.

Fulfilling the 12-month Government service agreement that Ms. Maldonado signed incident to her recruitment for assignment to Puerto Rico did not satisfy the agency's 2-year initial service completion requirement for renewal agreement travel. The employee's obligation under this agreement is limited to remaining in the Government service for 12 months after the transfer, regardless of whether the duty is within or outside the conterminous United States. Meeting the obligation entitles the employee to retain travel and transportation expenses paid in connection with her assignment or transfer to the overseas post under subparagraph 2-1.5a(1)(b) of the FTR. On the other hand, entitlement to renewal agreement travel under 5 U.S.C. § 5728(a) requires an initial agreed period of completed service outside the continental United States and a new written agreement to serve another overseas tour of duty. See subparagraph 2-1.5h(1)(a) of the FTR.

However, the agency's failure to accord Ms. Maldonado the opportunity to execute an overseas tour renewal agreement does not foreclose her entitlement to tour renewal travel. An employee who is transferred from her place of actual residence in the conterminous United States for assignment in Puerto Rico, and who meets all of the eligibility requirements under 5 U.S.C. § 5728 is entitled to renewal agreement travel. In holding that an agency cannot defeat an employee's travel entitlement under section 5728 by refusing to negotiate a renewal agreement where the particular position could be filled locally, we have recognized that renewal agreement travel is not merely a matter of privilege. As stated in 5 U.S.C. § 5728, "* * * an agency shall pay * * * the expenses of round-trip travel * * *" when the conditions of entitlement are satisfied. The term "shall pay" is mandatory rather than discretionary. Thus, in our decision 37 Comp. Gen. 848 (1958), we concluded that a "policy which purports to deny otherwise proper rights, as to home leave, by retaining the employee on its rolls at an overseas installation, granting him leave, and refusing to let him enter into another employment agreement solely because the position, if vacant, could have been filled locally at time of the leave may not be given effect so as to defeat the right to home leave." To hold otherwise would be, we stated, "tantamount to authorizing a circumvention of the statute."

More recently in the *Hendricks* case, cited above in regard to the legislative history of 5 U.S.C. § 5728, we specifically recognized that an employee's entitlement to renewal agreement travel is not de-

feated by the fact that he may have served in an overseas area without a written agreement, if he has served at such post for the period normally required of other employees of the agency serving in the same area.

Accordingly, since Ms. Maldonado served the ordinary period overseas expected of Department of Agriculture employees assigned to Puerto Rico and her place of residence at time of transfer to Puerto Rico was in the United States, she met the essential requirements for entitlement to renewal agreement travel expenses.

IV. Place of Actual Residence

As discussed extensively with regard to employees assigned to duty in Puerto Rico in our decision *Rafael F. Arroyo,* B–197205, May 16, 1980, *reconsidered* February 16, 1982, the designation of an employee's place of actual residence is an administrative responsibility which must be made on the basis of all the facts in each individual case. 45 Comp. Gen. 136 (1965); 39 *id.* 337 (1959). Ordinarily our Office will not question any reasonable determination made by the agency of the employee's actual residence unless plainly erroneous or inconsistent with the law or regulations. See generally 35 Comp. Gen. 244 (1955).

The record before us permits no other finding than that Ms. Maldonado's place of actual residence was within the continental United States at the time of her assignment to Puerto Rico in 1974. The agency exceeded its authority by in effect attempting to arbitrarily redesignate her actual residence designation to Puerto Rico to coincide with her assignment to Puerto Rico in May of 1974.

ROTATIONAL VS. PERMANENT ASSIGNMENTS

The agency's policy of denying overseas employment rights to employees depending on whether an assignment is "rotational" or "permanent" and because a position in Puerto Rico could have been filled locally is unsupported by the eligibility provisions of the entitlement statutes.

As we have noted, Ms. Maldonado's entitlement to accumulate 45 days of annual leave and accrue home leave is derived from specific statutory entitlements, as implemented by OPM regulations promulgated pursuant to specific delegations of authority under those statutes. These authorities may not be waived, modified, or otherwise substantively changed to effect an agency's policy predilections. Similarly, Ms. Maldonado's right to an overseas employment agreement and to negotiate a tour renewal travel agreement is founded in the clear provisions of 5 U.S.C. § 5724 and § 5728, as implemented pursuant to statutory delegation in the General Services Administration regulations.

CONCLUSION

In accordance with our analysis of the statutory entitlements discussed above we conclude that as a matter of fact Ms. Maldonado was recruited from the continental United States for assignment outside the continental United States in Puerto Rico. At the time of this personnel action in 1974, Ms. Maldonado's place of actual residence was within the continental United States. It follows that as a matter of law, having met all of the eligibility requirements under 5 U.S.C. § 6304(b)(1), Ms. Maldonado was entitled to earn and accrue 45 days of annual leave, home leave accrual under 5 U.S.C. § 6305(a), and tour renewal agreement travel under 5 U.S.C. § 5728.

In accordance with our decision here, the agency should take action to effectuate Ms. Maldonado's overseas transfer entitlements, and to review its policy regarding overseas transfer assignments generally.

[B-210059]

Pay—Retired—Survivor Benefit Plan—Guaranteed Minimum Income

The Survivor Benefit Plan, 10 U.S.C. 1447-1455, is an income maintenance program for the surviving dependents of deceased service members. If a member elects to have dependent child annuity coverage when he becomes a participant in the Plan, that coverage is not limited to children he has at the time of the election, but extends automatically and involuntarily to any child he thereafter acquires. Hence, annuity coverage automatically extended to the son acquired by birth in 1981 following a remarriage by a retired Army officer who had elected to have dependent child coverage when he became a Plan participant in 1973.

Pay—Retired—Survivor Benefit Plan—Termination or Reduction—Children's Benefits

The election made by a retired service member who is married and has dependent children to participate in the Survivor Benefit Plan with full spouse and dependent child annuity coverage is binding and may not be unilaterally revoked by him, so that a retired Army officer who elected to have such coverage in 1973 could not, after divorce and remarriage, withhold dependent child annuity coverage from a son he acquired in 1981 even though by that time the only dependent child he had in 1973 was no longer eligible for an annuity.

Pay—Retired—Survivor Benefit Plan—Children—Post-Participation Election Changes of Member

In August 1981 the Congress granted a 1-year "open enrollment" period under the Survivor Benefit Plan for retired military personnel who had previously elected to participate in the Plan at less than the maximum level, or not to participate at all. However, the "open enrollment" legislation did not give personnel who were already participating in the Plan the option of either reducing the level of their participation or withdrawing from the program. Consequently, that legislation did not authorize a Plan participant to revoke the full dependent child annuity coverage he had previously elected to have.

Pay—Retired—Survivor Benefit Plan—Children—Cost of Coverage—Actuarial Basis

Statutory provisions of the Survivor Benefit Plan direct that costs of dependent child annuity coverage be assessed "by an amount prescribed under regulations of the Secretary of Defense." Consistent with express Congressional intent, the regulations prescribe computation of those costs on an actuarial basis in which the ages of the Plan participant and his eligible dependents are used. When a Plan participant acquires a dependent child and he has no other children remaining who are eligible for an annuity, those costs are to be reinstated, computed under that prescribed method based on the age of the newly acquired child.

Pay—Retired—Survivor Benefit Plan—Children—Born After Election

If a Survivor Benefit Plan participant with dependent child annuity coverage acquires a new dependent child after all of his other children have become ineligible for an annuity and all cost assessments for their coverage have been terminated, the newly acquired child is eligible for an annuity even if the participant fails to notify the concerned finance center of the child's existence. However, in that situation the delinquent costs would have to be collected before annuity payments could commence.

Matter of: Colonel Angus B. MacLean, USA (Retired), July 13, 1983:

This action is in response to a request for an advance decision from a special disbursing agent of the Army Finance and Accounting Center concerning the propriety of approving a voucher in the amount of $1,295.14 in favor of Colonel Angus B. MacLean, USA (Retired), 285-14-3376. That amount represents reductions in Colonel MacLean's retired pay for the period from August 1, 1981, through September 30, 1982, which are refundable to him if it may properly be concluded that he is entitled to revoke his 1973 election to provide Survivor Benefit Plan annuity coverage for his spouse and dependent children and thus withhold coverage from a son born in 1981. The request was assigned submission number DO-A-1410 by the Department of Defense Military Pay and Allowance Committee.

We conclude that Colonel MacLean may not revoke his election and that the voucher may not be approved for payment.

Background

Colonel MacLean retired from active Army service in 1971. In 1973 he elected to participate in the Survivor Benefit Plan, at the maximum level with spouse and dependent child coverage, thus choosing to receive retired pay at a reduced rate in order to provide an annuity for his wife and dependent children if they survived him. At that time he had one dependent child, an 18-year-old daughter. The reductions in his retired pay for the cost of providing annuity coverage for her were terminated in 1976 after she

reached the age of 22 and would no longer qualify for an annuity as his "dependent child" under the Plan if she survived him.

Thereafter, Colonel MacLean was divorced and remarried and a son was born to him and his wife on July 15, 1981. In a form dated April 28, 1982, Colonel MacLean advised the Army Finance and Accounting Center of his remarriage and the birth and requested that annuity coverage be extended to his wife and son. Army officials then calculated the costs of that coverage from the time of the son's birth on an actuarial basis. Because of the greater probability that this son would succeed to an annuity then had been so in the case of his daughter, those costs were considerably higher than the amounts by which Colonel MacLean's retired pay had been reduced between 1973 and 1976 to provide annuity coverage for his daughter. Colonel MacLean now indicates that he does not desire any annuity coverage for his son because of those higher costs, and he asks that this coverage be canceled either under the "open enrollment" granted by the Congress or as may otherwise be permitted.

In requesting a decision in this matter the disbursing agent notes that as a general rule Survivor Benefit Plan elections to provide dependent child coverage are irrevocable, and that coverage is automatically extended to any children born after the election is made. The disbursing agent also notes that in *Matter of Peniston,* 57 Comp. Gen. 847 (1978), we expressed the view that because costs of dependent child coverage are to be determined on an actuarial basis, generally those costs should be recomputed upon the happening of an event that significantly increases or decreases the probability that an annuity will be paid to the children. However, the disbursing agent observes that Colonel MacLean's situation is somewhat unusual in that his son was born at a time when he no longer had any other dependent children who might qualify for the annuity, and when he was no longer paying for dependent child annuity coverage through reductions in his retired pay. Because of this, doubt has arisen concerning the propriety of extending annuity coverage to the son against Colonel MacLean's wishes, and concerning the proper method to be used to compute the costs of annuity coverage if it is determined that coverage is mandatory. Four specific questions about the matter are presented.

Irrevocability of Election

The first question is:

a. Should cost for child coverage be reinstated upon the birth of a child after the children initially covered have all become ineligible?

The Survivor Benefit Plan, 10 U.S.C. §§ 1447–1455, is an income maintenance program for the surviving dependents of deceased service members. The Plan was established on September 21, 1972, with the enactment of Public Law 92–425, 86 Stat. 706. Under 10 U.S.C. § 1448(a) and implementing regulations contained in chapter

2 of Department of Defense Directive 1332.27, every active duty service member after the date of enactment who is married and has a dependent child when he becomes entitled to military retired pay automatically becomes a participant in the Plan with the maximum spouse and dependent child coverage authorized, unless he makes an affirmative election to withhold coverage from either his spouse or his children, to provide less coverage than the maximum authorized, or not to participate in the Plan at all. The election made by the service member in that situation becomes final at the time he becomes entitled to retired pay, and he may not thereafter unilaterally revoke or modify it. See 53 Comp. Gen. 470, 474 (1974).

In addition, subsection 3(b) of Public Law 92-425 gave service members like Colonel MacLean who had retired prior to September 21, 1972, an opportunity within certain time limits to elect to participate in the Plan in the same degree as members retiring after that date. Timely elections then made by those retired members who were married and had dependent children to have spouse and dependent child annuity coverage under the Plan are likewise binding and irrevocable, and may not be changed through unilateral action by the Plan participant. See *Matter of Metzler,* 56 Comp. Gen. 1022, 1025-1026 (1977), and *Matter of SBP Revocation,* 55 Comp. Gen. 158 (1975).

In August 1981 the Congress granted a 1-year "open enrollment" period for the Survivor Benefit Plan, during which retired personnel who had previously elected to participate in the Plan at less than the maximum level, or not to participate at all, were given an opportunity to reconsider their actions and to make new elections. However, the legislation granting this "open enrollment" period did not give retired personnel who were already participating in the Plan the option of either reducing the level of their participation or withdrawing from the program. See section 212 of Public Law 97-35, approved August 13, 1981, 95 Stat. 383, 10 U.S.C. 1448 note. Thus, elections previously made by retired personnel to provide full spouse and dependent child annuity coverage under the Plan remained irrevocable during the "open enrollment"period and remain so now.

Concerning the status of a child acquired by a service member after he has elected to participate in the Survivor Benefit Plan with dependent child as well as spouse coverage, 10 U.S.C. § 1450(a) provides that the survivors' annuity authorized by the Plan is payable in the following order to:

> (1) the eligible widow or widower;
> (2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible * * *

Thus, for purposes of annuity payments under the Plan, "dependent children" are an indivisible class consisting of those who survive the Plan participant rather than those whom he had at the

time he elected to participate in the Plan. Moreover, under 10 U.S.C. § 1447(5) the term "dependent child" is defined as including *any* unmarried child of a Plan participant under 18 years of age, and also between 18 and 22 years of age if pursuing a full-time course of study or training. Further, there is no provision in the Survivor Benefit Plan legislation which allows service members to either grant or deny annuity coverage to any children they acquire after they have elected to become Plan participants with dependent child coverage. Hence, we have held that annuity coverage for a "dependent child" under the Plan is not limited to just those children that a service member has when he becomes a participant in the Plan, but extends automatically and involuntarily to any children he thereafter acquires, even to those in being who are born after he dies. See *Matter of Roberts,* 60 Comp. Gen. 240, 243 (1981).

In the present case, therefore, our view is that Colonel MacLean's 1973 election to participate in the Survivor Benefit Plan with dependent child annuity coverage is binding and may not be unilaterally revoked by him, and that this annuity coverage automatically extends to the son he acquired in 1981 effective on the date of his son's birth, notwithstanding any contrary desires he may now have in the matter. We view it as immaterial that the dependent daughter he had when he elected to participate in the Plan reached age 22 and became ineligible for an annuity before his son was born since, as indicated, the Plan is designed as income maintenance protection for the surviving dependents of service members rather than just the dependents they had when they elected into the program, and a member cannot choose to withhold annuity coverage from any dependent child acquired after that election.

Because Colonel MacLean's son at birth automatically received Survivor Benefit Plan annuity coverage, it necessarily follows that the costs of dependent child coverage should have been concurrently reinstated through appropriate reductions in Colonel MacLean's retired pay. The answer to question "a" is therefore affirmative.

Cost Computation

The second and third questions presented are:

b. If the answer to a. is affirmative, would recalculation of cost be made in accordance with 57 Comp. Gen. 847?
c. If the answer to b. is negative, then what would be the proper method?

The provisions of 10 U.S.C. § 1452, relating to the reductions in retired pay required of Survivor Benefit Plan participants, prescribe a specific formula for computing the costs of spouse coverage. On the other hand, no formula is prescribed for calculating the costs of dependent child coverage, and instead it is simply directed that those costs be assessed "by an amount prescribed under regulations of the Secretary of Defense." However, the legislative

history of the act establishing the plan demonstrates a plain intent by the Congress that "[t]he cost of dependent children's coverage * * * be based on the actuarial cost of providing benefits * * *." See *Matter of SBP,* 54 Comp. Gen. 709, 715 (1975). A set formula for computing the costs of dependent child annuity coverage was not included in the act because it was recognized that the probabilities of any given dependent child receiving an annuity were subject to a greater number of statistical variables than the probabilities of a spouse's receipt of an annuity. See *Matter of Peniston,* cited above, at 57 Comp. Gen. page 851.

Consistent with the intentions expressed by the Congress, the implementing regulations contained in chapter 5 of Department of Defense Directive 1332.27 provide that the reduction of retired pay for dependent child annuity coverage under the Survivor Benefit Plan will be an actuarial charge arrived at through the use of specified cost factors based in part on the age of the Plan participant and the age of his youngest child. Section 501.d of those regulations further provides that:

> d. The cost of providing coverage for a child or children * * * will not be recalculated when a child different from the child initially established as the youngest child becomes the youngest child (for example, if the initially youngest child dies or if a younger child is subsequently acquired). However, for the member providing coverage for children only * * * if a spouse is acquired after retirement, the cost of coverage for children will be recalculated based on the age of the youngest child and the age of the member and spouse, * * * at the time coverage is elected for the spouse.

While not specifically referred to, the provisions of section 501.d were considered in *Matter of Peniston,* 57 Comp. Gen. 847, cited above, in which we held that whenever a Survivor Benefit Plan participant, with spouse and dependent child annuity coverage, either loses or reacquires an eligible spouse beneficiary through divorce, remarriage, etc., the costs of the dependent children's coverage are to be recalculated on an actuarial basis and the age of the participant's youngest child at that time is to be used in the new computation. The reason for this is that the participant's loss or reacquisition of a spouse results in a significant corresponding increase or decrease in the statistical probability of the children as a class receiving an annuity, so that a recomputation of the costs of their coverage then becomes necessary. Since a completely new cost computation is required in that situation, use in the recomputation of the age of the youngest child the Plan participant then has is warranted on actuarial grounds.

Although we have not required recalculation of the reduction to the retiree's retired pay when there is only a change in the age of the youngest child beneficiary, when there is also involved a change in spouse beneficiary, thus involving more radical changes in actuarial factors, we have found that a recalculation of the reduction in retired pay is required.

The *Peniston* decision involved the question of recomputing the costs of dependent child annuity coverage when a Survivor Benefit Plan participant loses or reacquires an eligible spouse beneficiary, but we find that the rationale of the decision is also applicable to the question presented here concerning the recomputation of costs after a Plan participant acquires a new dependent child at a time when he has no other eligible dependent child beneficiaries remaining. In that situation, the newly acquired child will generally have a significantly higher statistical chance of receiving an annuity than the other children had, and an account adjustment for the reinstatement of the costs of annuity coverage will in any event be required, so that the costs are properly for recomputation on an actuarial basis founded upon the age of that newly acquired child, the Plan participant and his spouse.

In the present case, therefore, we conclude that it was necessary to reinstate the cost of dependent child annuity coverage in Colonel MacLean's retired pay account upon the birth of his son in 1981, and that these costs were properly for computation under the actuarial method prescribed by chapter 5, Department of Defense Directive 1332.27, based on the age of his son rather than that of his daughter who was no longer an eligible beneficiary. Since this was, in fact, the method used to compute the amount of the reinstated costs, we further conclude that the costs were properly computed and that no refund is payable to Colonel MacLean either on the voucher here at issue or otherwise.

Questions "b" and "c" are so answered.

Payment of Annuity

The fourth and final question presented is:

d. If a member fails to advise the finance center of the additional child and child cost had been terminated based on children of record, would the child be considered an eligible child beneficiary?

As was indicated in the answer to question "a," dependent child annuity coverage extends automatically and involuntarily to every dependent child that a Survivor Benefit Plan participant acquires after he elects such coverage, notwithstanding any personal desires he may have to the contrary and regardless of any notice or advice he may personally give to the finance center. Hence, if a claim for an annuity were to be asserted by or on behalf of the dependent child of a deceased Plan participant, the annuity could be paid even if the participant had failed to give the finance center advance notice of his acquisition of the child, provided satisfactory evidence were presented to the finance center establishing that the claimant was in fact the dependent child of the deceased Plan participant, and provided all necessary costs were collected as required by section 501.j, Department of Defense Directive 1332.27, which states:

j. An annual interest charge of 6 percent compounded annually shall be charged for delinquencies in the payment of the cost of coverage. At the time of death of a retiree, any delinquency, plus interest, shall be collected from the annuitant's benefits prior to the payment of any annuity.

The four questions presented are answered accordingly. The voucher, which may not be approved for payment, will be retained here.

[B-210244]

Subsistence—Per Diem—Headquarters—Permanent or Temporary—Criteria

The assignment of a Customs Service employee to a new duty station for 2 years under a rotational staffing program is held to be a permanent change of station rather than a temporary duty assignment. We have held that the duration of an assignment and the nature of the assigned duties are vital elements in the determination of whether an assignment is temporary duty or permanent change of station. Although the assignment here is for a definite time period and further reassignment of the employee is contemplated, the duration of the assignment is far in excess of that normally contemplated as temporary. Moreover, the duties assigned are not those usually associated with temporary duty.

Matter of: Peter J. Dispenzirie—Temporary Duty vs. Permanent Change of Station, July 13, 1983:

On May 12, 1982, the United States Customs Service initiated a rotational staffing program for certain of its Senior Executive Service (SES) employees, the stated purpose of which was to increase the number of opportunities for those employees to gain experience in various Customs positions and to enhance Customs' policy-making process. Assignments in the rotational staffing program are made for a 2-year period, although they are reviewed at the end of 1 year and may canceled at that time. The Commissioner of Customs has requested our decision as to whether one of these assignments should be considered temporary duty or a permanent change of station. We conclude that the assignment in question is a permanent change of station. The basis for this conclusion is set forth below.

A directive implementing the rotational staffing program was issued on August 23, 1982. It sets forth procedures for the selection of participants and contains statements on the financial impact and ceiling implications of the program. The directive provides that at the beginning of each fiscal year, each Regional Commissioner and Assistant Commissioner is to compile a list of potential positions to be filled under this policy. When a position becomes vacant the Commissioner of Customs either approves or disapproves a personnel recruitment action. Up to 12 positions are to be identified each year for the program and, therefore, due to the 2-year duration of the assignments, the rotational staffing program could involve up to 24 positions at the same time. The directive provides, however, that unless and until a rotational staffing assignment is

made permanent, no change of personnel ceiling is to occur in either the gaining or the losing organization.

The directive does not contain a set policy as to whether the rotational staffing assignments are to be considered temporary duty assignments or permanent changes of station, but instead provides as follows:

> * * * To assure that the rotation is most cost-beneficial to the government, OFMPE [Office of Financial Management and Program Evaluation] will prepare a cost estimate for each employee selected for a rotational placement and recommend to management whether TDY or PCS is the appropriate procedure for relocation.

Under a section entitled "Impact on Employee" that directive provides further as follows:

> There are two ways, TDY and PCS, in which an employee can be reimbursed for expenses incurred in connection with the Customs new rotational policy. Each employee will be handled individually. Although a recommendation will be made by OFMPE as to the most beneficial reimbursement, the employees personal interests will be considered prior to the determination. Both methods have personal and financial impact including income tax implications. According to interpretations of IRS regulations, an employee on TDY status in an assignment expected to last a year or more is not on a temporary assignment and *cannot* deduct travel, meals, and lodging expenses for the assignment, but must report any reimbursements from the government as income. Any employee desiring a TDY status should be aware of this regulation.
>
> When an employee accepts a PCS, a part of the amount is taxable for income tax purposes and is reported to the IRS as income. Any employee desiring a PCS should be aware of this.

Customs has informed us that the question posed to us arose in connection with the assignment of Mr. Peter J. Dispenzirie from New Orleans to Chicago, to act as Regional Commissioner from July 1982 to July 1984. The agency believes its determination to treat Mr. Dispenzirie's assignment as temporary duty is appropriate for it is in accord with our decisions. Customs further contends that the determination of whether an assignment is temporary duty or a permanent change of station is controlled by an examination of two factors—the intent of the agency in making the assignment and the benefit to the Government.

Citing 24 Comp. Gen. 667 (1945), Customs states that an agency's intent to make either a temporary duty or permanent duty assignment is revealed, respectively, by whether it contemplates a further assignment to a new station or a return to the old station, or by whether it is planning to indefinitely transfer the employee to the place in question. The agency states that Mr. Dispenzirie's assignment is for a finite period and a further assignment to a new station is contemplated as shown by the fact that Customs has promised the position to another employee.

The second factor Customs discusses is the benefit to the agency. *Robert E. Larrabee,* 57 Comp. Gen. 147 (1977), is cited for the proposition that an agency must make a cost comparison between temporary duty and permanent change-of-station status to determine which is more beneficial to the Government. The submission includes a cost comparison showing that it is less expensive for Cus-

toms to treat Mr. Dispenzirie's assignment as a temporary duty assignment. Although we feel that some of the assumptions Customs has made in connection with determining the cost of the two methods of reimbursement are questionable, the result of the cost comparison is not dispositive of this case.

We disagree with Customs' analysis of our decisions and the conclusion it reaches. The Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), do not contain a formal definition of a temporary duty assignment, but under the provisions of FTR para. 1-7.6a, an employee may not be paid per diem at his permanent duty station or at the place of abode from which he commutes daily to his official station. In this connection, in 31 Comp. Gen. 289 (1952) we stated the following rule, which we had enunciated as early as 1924:

> * * * the authority to determine and designate the post of duty of an officer or employee of the Government includes only the authority to fix the place at which the employee should actually establish official headquarters, and from which he should in fact operate, which, ordinarily is the place where the employee would be required to spend most of his time. The designation of any other place, for the purpose of giving the employee a subsistence allowance for the greater portion, or all, of his time is not within the authority vested in the head of a department or other administrative official charged with the duty of designating posts of duty of Government employees, and does not entitle an employee to per diem when absent therefrom and performing duty at another place, which latter place is in fact his post of duty. 27 Comp. Gen. 657; 19 *id.* 347, 18 *id.* 423, 10 *id.* 469; 4 *id.* 320. 31 Comp. Gen. at 291.

We have long held that the location of an employee's official duty station is a question of fact, not limited by the agency's designation, to be determined from the orders directing the assignment and from the nature and duration of the assignment. See *Frederick Welch,* 62 Comp. Gen. 80 (1982) and cases cited therein. We have stated that the duration and nature of the duties assigned are of particular importance in making the determination of whether an assignment to a particular duty station is a permanent change of station. 33 Comp. Gen. 98 (1953); 36 *id.* 757 (1957). In 38 Comp. Gen. 853 (1959) we described the duration of an assignment as a vital element in that determination. We explained our basis for that statement as follows:

> A permanent station, or designated post of duty, is defined in paragraph 1150-10 of the Joint Travel Regulations as the post of duty or official station to which a member is assigned or attached for duty other than "temporary duty or temporary additional duty." That is, it is the place of the principal basic duty assignment. Prolonged absences from such assignment for temporary duty, or for other purpose, are inconsistent with the continuity of performance ordinarily contemplated and required in such basic assignment, and consequently as a general proposition, a foreseeable absence for the performance of another duty for more than a short period is considered to break that continuity with the effect that the assignment loses its characteristics of being the basic duty assignment, and there are established in the substituted duty the characteristics of a basic assignment.* * *. 38 Comp. Gen. at 856.

Instead of focusing on the duration of an assignment as determinative of its character, Customs focuses on the terminable nature

of the assignment. As we indicated above, Customs cited 24 Comp. Gen. 667 (1945) for the proposition that employees assigned under conditions which contemplate a further assignment to a new station or a return to the old station are in a temporary duty status. In that case we held that certain assignments of military personnel to replacement pools, schools, or similar stations for an indefinite period could be considered as permanent changes of station. We qualified that holding, stating that such assignments could be treated as permanent assignments:

> * * * unless the facts and circumstances in a particular case reasonably indicate an assignment to temporary duty, that is, where the facts and circumstances in a particular case indicate an assignment for a definite period of relatively short duration—a further assignment to a new station, or return to the old permanent station being contemplated by the orders.* * * 24 Comp. Gen. at 671.

Despite the authority which this language appears to lend to Customs' view that Mr. Dispenzirie's assignment is temporary duty because it is to end on a certain date and his further assignment is certain, we do not believe it supports that view. We believe a proper reading of that language is that a *brief* assignment to be terminated on a certain date and followed by further assignment or return to a previous assignment is a temporary duty assignment rather than a permanent change of station. In other words, simply because an assignment will be terminated at a certain time and will be followed by a further assignment does not make it temporary duty when its duration is longer than that usually associated with a temporary duty assignment.

Our view is supported by 36 Comp. Gen. 757 (1957) where we held that the assignment of members of the uniformed services to Antarctica incident to Operation "Deepfreeze II" for an 18-month period, after which time they were to return to their permanent duty station, was far in excess of the duration which could reasonably be considered temporary duty. In that case, the argument was made that since the assignment was terminable, it should be considered temporary duty in light of a similar case in which the terminable nature of a duty assignment was held to be indicative of its temporary nature. We responded to that argument as follows:

> * * * The terminable nature of the duty assignment involved in the decision of September 1, 1953 [33 Comp. Gen. 103], to which you referred, was considered to be indicative of a temporary assignment only because that feature distinguished it from the indefinite time element ordinarily associated with permanent duty assignments. It was not intended to convey the impression that such feature would indicate a temporary duty assignment in a case where the termination date set in the orders established a duty period prolonged to a point where other considerations required a determination that the assignment was permanent in nature. 36 Comp. Gen. at 758.

We further stated in that decision that:

> * * * If a member's immediate duty assignment extends beyond that point [reasonable temporary duty limitations] it becomes his paramount assignment—his permanent duty assignment—and the one indicated as that which he should resume or assume upon its completion becomes so remote that it loses its characteristics of

being his basic duty assignment. Where such circumstances occur, it is concluded that the orders in fact direct a permanent change of station from the beginning. 36 Comp. Gen. at 758.

We do not believe that an assignment expected to last for 2 years can be considered to be of the short duration contemplated by the term temporary duty. Customs argues that for us to find that the 2-year period is temporary duty would be in accord with and not substantially different from our decisions in *Robert E. Larrabee,* 57 Comp. Gen. 147 (1977) and in 3 *id.* 907 (1924), where we approved an agency's designation of temporary duty status for assignments of 17 months in the former case and almost a year in the latter. We approved the agency's designation in those cases because in each the assignment was originally intended to last for a much shorter time and was extended after the employee began performing the duties of the assignment. We explained our reasoning in *Larrabee* as follows:

> * * * While the location of an employee's permanent station presents a question of fact and is not limited by the administrative designation, and while the length of Mr. Larrabee's assignment to Richardson is of such duration as to raise a question concerning the validity of its designation as his temporary duty station, under the circumstances we take no exception to that designation for the purpose of claims which have heretofore accrued. In this regard, we find particularly persuasive the fact that the assignment was initially intended to cover only a 5-month period and that the assignment was extended for no more than 6 months at a time. At the time the initial orders were issued it appears that the assignment was intended to be of sufficiently short duration to constitute a legitimate temporary duty assignment. As a matter of hindsight, given the total duration of the assignment as twice extended, it would appear that Mr. Larrabee should have been given permanent change of station orders at the outset. However, assuming that the orders were twice extended on the legitimate expectation that the assignment would terminate at the end of each extension period, we find no basis to question the Navy's designation of Mr. Larrabee's assignment as for temporary duty insofar as that designation affects the claims submitted. * * *. 57 Comp. Gen. at 149.

Absent the special circumstances of the *Larrabee* case, we would have considered temporary duty status an inappropriate designation for an assignment of 17 months. Similarly, as previously mentioned, we held in 36 Comp. Gen. 757 that an assignment of 18 months was far in excess of the reasonable duration of a temporary duty assignment. And in *Peck and Snow,* B-198887, September 21, 1981, we held that an assignment for 2 years and 9 months was, in fact, a permanent change of station rather than a temporary duty assignment.

There is additional information which leads us to the conclusion that an assignment of 2 years is longer than is normally contemplated for a temporary assignment. As pointed out in Custom's directive on the Rotational Staffing Policy, the Internal Revenue Service (IRS) views a temporary assignment for income tax purposes as one which lasts for less than 1 year. In Revenue Ruling 60-189, 1960-1 CB 60, the IRS stated as follows:

> Although neither the Service nor the courts have attempted to prescribe any specific length of time as representing the usual line of demarcation between temporary and nontemporary periods for traveling expense purposes, and employment or stay of anticipated or actual duration of a year or more at a particular location

must be viewed by the Service as strongly tending to indicate presence there beyond a temporary period, and cases involving such an employment or stay will normally for that reason alone be subjected to close scrutiny. Cases involving *anticipated* or *actual* periods of almost a full year may, as a factual matter, be open to question in nearly the same degree, especially since there might be little real difference between a taxpayer's expectations in such a case and one in which his employment or stay at a particular location is expected to continue for a year or more. Nevertheless, in the interest of practical and fair administration, in cases involving substantially the same facts as Case (1) the Service will normally raise no question concerning the temporary nature of an employment or stay at a particular location if both its anticipated and actual durations are for less than one year, unless the facts concerning the frequency of employments away from the city where business contacts are maintained disclose a pattern suggesting that the taxpayer may have sought without real business justification to take advantage of an assumed lenience on the part of the Service concerning tax avoidance abuses in this area.

The conclusion that a year is the determinative time period can also be drawn from the fact that FTR para. 2-1.5a(1)(a) requires a signed agreement for 12 months service in connection with each permanent change of station. Furthermore, although the FTR provides no guidance concerning the maximum duration of a temporary duty assignment, paragraph C4455 of Volume 2 the Joint Travel Regulations (2 JTR) directs that consideration should be given to changing an employee's permanent duty station when a period of temporary duty at one location will exceed 2 months, unless there is reason to expect that the employee will return to his permanent duty station within 6 months.

It is not only the duration of an assignment, but also the nature of the duties assigned which reveals its character. Mr. Dispenzirie was assigned to act as the head of the Chicago Regional Office for 2 years. This does not seem to be the type of assignment which is normally made on a temporary basis.

Customs has stated that the benefit to the Government is the second factor which should be examined to determine the status of a particular assignment. Customs equates benefit with cost savings and cites *Larrabee* for the proposition that an agency should effect an assignment based on the results of a cost comparison. In that case we upheld the agency's designation of an assignment as temporary duty. The employee was orignially assigned for a 5-month period which was extended for two additional 6-month periods. We held that under the circumstances, the agency's designation of the assignment as temporary duty rather than as a permanent change-of-duty station was not clearly improper, and we allowed payment of per diem for the claims accrued. The employee was continuing to perform duties at that site, however, and it was in connection with his further assignment that we directed a cost comparison between retaining the employee in a temporary duty status and permanently transferring him. During the assignment the employee had purchased a residence at the temporary duty site and had relocated his family so he would not have been entitled to residence purchase expenses or to a significant portion of the expenses ordinarily associated with a permanent change of station. If the additional assignment was to be of any significant length, our direction to the

agency to make a cost comparison was, in effect, a direction to transfer the employee on a permanent basis. We do not agree with Customs that this case directs agencies to make a cost comparison at the time of an original assignment.

In 36 Comp. Gen. 757 (1957), where we held that 18-month temporary duty assignments to the Antarctica were improper, we noted the agency's argument for temporary duty status as follows:

> * * * Also, there were noted as factors in the determination to administer the operation on a temporary duty basis the fact that the costs of transportation of dependents, dislocation allowances, and shipments of household effects that would be payable were the operation conducted on a permanent change of station basis would probably offset the per diem allowances payable on the temporary duty basis. You indicate that the temporary duty basis would offer more satisfaction to the members involved in the mission in that the necessity for disrupting their families, with the attending inconveniences, broken school years, and expenses would be removed. 36 Comp. Gen. at 757.

Although we noted these arguments, they did not affect our decision that the assignments were not in fact temporary assignments for which the payment of per diem was authorized.

Because the duration of the assignment made under Customs' rotational staffing policy and the nature of the duties assigned are so far removed from what is ordinarily contemplated as temporary duty, we must conclude that Mr. Dispenzirie's assignment to Chicago is not a temporary duty assignment for which the payment of per diem or actual expenses is authorized.

[B-211477]

Appropriations—Availability—Expenses Incident to Specific Purposes—Necessary Expenses

General Accounting Office will not dispute Army's administrative determination concerning procurement of calendars for use by the Chaplain's Office and Army Community Services to disseminate pertinent information about services available to military personnel and their families.

Matter of: Department of the Army—Purchase of Commercial Calendars, July 14, 1983:

The Office of the Comptroller of the Department of the Army has forwarded to us for our decision questions raised by the Finance and Accounting Officer at the Seneca Army Depot, Romulus, New York, who wishes to know whether appropriated funds may be used by the Chaplain's Office and Army Community Services (ACS) to pay for commercially available wall calendars purchased solely for publicity purposes. The two offices concerned contend that appropriated funds should be available for payment because these expenditures were reasonably necessary for the authorized programs involved. An authorized contracting officer effected the procurement. This determination is not in conflict with any principles of appropriation law in either statutes, regulations, or our pre-

vious decisions. We therefore see no reason to question the Army's administrative determination of necessity.

The Chaplain's Office and ACS each ordered 500 wall calendars imprinted with program information from commercial establishments. Initially these calendars were paid for out of funds from the Operation and Maintenance, Army (OMA) appropriation. Later, due to the Finance and Accounting Officer's concerns, the Chaplain's Office and ACS were requested to reimburse the appropriated funds accounts for the purchases from non-appropriated funds available to them. The Chaplain's Office has made the reimbursement as requested; Community Services has not. Both offices assert that the calendars are proper expenses payable from appropriated funds.

The Finance and Accounting Officer first questions whether the commercial purchase of calendars is allowable under Army printing regulations. According to the record, the calendars were carried in stock by the commercial supplier and therefore were purchased as supply items, defined in Army Regulation (AR) 310-1, app. A. para. Y, (December 1, 1976). As we read the Army's regulations, the information imprinted on the calendars is not printing within the definition of printing contained in AR 310-1, para. 2-14(c). This regulation preludes duplicating less than 5,000 single page documents from the definition of printing. Accordingly, this purchase did not have to meet the Army's printing regulations.

The Finance and Accounting Officer next cites AR 310-1, para. 2-19 which states that standard Government wall and desk calendars are the only calendars authorized at Government expense. This regulation appears to implement Government Printing and Binding Regulations 22-1 (April 1977) which requires agencies to order calendars from the General Services Administration (GSA).

Standard Government calendars carried as GSA stock items do not have an overleaf suitable for imprinting the information desired by the Chaplain's Office and ACS. However, 41 C.F.R. § 101-26.100-2 (1982) states: "When items * * * provided by GSA stock or Federal Supply Schedule will not serve the required functional end-use purpose, requests to waive the requirement for use of GSA sources shall be submitted to GSA for consideration." The same regulation in paragraph (b) further provides that "[a]gencies shall not initiate action to procure *similar* items from non-GSA sources until a request for a waiver has been requested from and approved by GSA." [Italic supplied.]

We were informally advised by GSA's Office of Commodity Management that agencies have not been required to request waivers unless there is a legitimate doubt about the availability of similar items from GSA. In this case, the calendars were purchased by the Chaplain's Office and ACS solely to disseminate program information to military personnel and their families. There were no items available from GSA stock or the Federal Supply Schedule which

could be readily used for this purpose and therefore a waiver request was not required.

The final objection raised by the Finance and Accounting Officer is that the calendars are not "a reasonable and necessary expense for program publicity." He points out that the publicizing of the services offered by both offices could be accomplished through existing media, *e.g.,* post newspapers or newsletters, bulletins, or by posting signs on bulletin boards and other "conspicuous places." Although we agree that the two programs could accomplish their purposes through these means, they are not necessarily the only way to do so.

While the purchase of calendars for promotional purposes is not specifically authorized, appropriated funds may be used for expenditures not specifically authorized where they are reasonably necessary or incident to the execution of the program or activity charged and for which there is an available appropriation. 50 Comp. Gen. 534, 536 (1971). The Chaplain's Office purchased 500 calendars which were imprinted with the following information:

Protestant worship—Sunday 1100 Hours.
Catholic masses—Saturday 1730 Hours, Sunday 1230 Hours.
Chaplain James E. Russell, Jr., Depot Chaplain, 869-0304. Father Thomas Florack, Priest 869-3111.
Seneca Army Depot Chapel.

Chaplains have a duty to hold religious services for the commands to which they are assigned. 10 U.S.C. § 3547 (1976). They are also responsible for coordinating religious services held for different faiths represented among military personnel. AR 165-20(e) (October 15, 1979). Publicizing the schedule of services is an appropriate extension of this duty.

Army regulations further require Chaplains to develop programs providing pastoral care, which involves "calling on families in their homes," AR 165-20, para. 2-1(c)(1), and giving "spiritual support and help to the sick and their families by visitations, counseling, religious ministrations, and other aid." AR 165-20 para. 2-1(c)(4). In order for chaplains to effectively carry out these duties, they may find it necessary to place their names and telephone numbers before those who may need their services. Wall calendars are a tradititonal publicity medium. They are readily visible in emergency situations, not easily lost, available to all family members at home, and used throughout the year.

There is a similar rationale put forward by the ACS for its purchase of 500 calendars. Although the record does not give specific details, we understand that these calendars were imprinted with the name of the ACS office, its building location and telephone extension.

The ASC program, as described in AR 608-1 (October 1, 1978) is a social services program for service members and their families. Examples of essential services which are to be provided by ACS cen-

ters include information and referral services, followup services, financial planning and assistance, the Army Child Advocacy Program (ACAP), and child support services. AR608-1, para. 2-2. Optional services may be developed at the local level to supplement the essential services, including the establishment of a 24 hour hotline telephone answering service established to provide emergency information and assistance. AR 608-1, ch. 3, sec. III.

ACS, too, feels it has a duty to publicize its programs, in order to be effective in serving the community. This duty is recognized in AR 608-1, para. 1-8.

As stated therein, the primary goal of ACS publicity is to make personnel and their families aware of the types of services offered and the location of the ACS Center. While the regulation cited above suggests a variety of publications and notices to accomplish this goal, its provisions do not appear to exclude other means of publicity, if found to be effective.

We considered a similar issue in a case involving the Labor Department's effort to publicize the services of the United States Employment Service to both prospective employers and unemployed veterans. The Department discharged a flock of balloons from a float in a parade. Attached to the balloons were mimeographed messages asking employers to list their available jobs and advising veterans to take advantage of this service. This Office held that because of the statutory duty imposed on the Department to publish information about its employment service activities and the fact that the balloons were purchased as a medium of disseminating pertinent information about the functions of the United States Employment Service, appropriated funds were available to pay for the cost. B-62501, January 7, 1947.

The commercial calendars purchased by the Chaplain's Office and ACS were also intended to disseminate pertinent information about services available to military personnel and their families. While other less expensive methods of conveying the information appear to have been contemplated by the applicable regulations, in the absence of any prohibition in a statute, regulation, or our own decision, we will not question the Army's administrative determination that the expense of the calendars was reasonably necessary to carry out the purposes of their respective programs. Therefore, payment for the calendars out of appropriated funds is permissible.

[B-208422]

General Services Administration—Procurement—Telephone Equipment and Related Services—Public Utility Services

Contract between General Services Administration (GSA) and a non-tariffed supplier for procurement of telephone equipment and related installation and maintenance services is one for "public utility services" within the scope of 40 U.S.C. 481(a)(3) (authorizing GSA to make contracts for public utility services for periods up to 10 years), since it is the nature of the services provided and not the nature of

the provider of the services that is determinative for the purpose of the law. Sale of telephone equipment is a utility type service. Installment purchase contracts as well as leases or leases with options to purchase are within the scope of 40 U.S.C. 481(a)(3).

General Services Administration—Procurement—Telephone Equipment and Related Services—Installment Purchase Contract—Financial Reporting—Capitalization

For the purpose of financial reporting GSA should capitalize equipment and installation portion of procurement characterized as a lease with an option to purchase (which in this case should be treated as an installment purchase contract), since it is clear that GSA intends to exercise option to take title to equipment at cost of $1 at expiration of 5-year contract term. Also, should GSA cancel contract, title to equipment would immediately vest in GSA and payment would be handled as provided for in the contract. See 2 GAO 12.5(d).

General Services Administration—Procurement—Telephone Equipment and Related Services—Installment Purchase Contract—Obligation of Funds—Annual Costs Only

GSA under authority of 40 U.S.C. 481(a)(3) may obligate only the amount necessary to cover its annual costs under lease with an option to purchase contract (which in this case should be treated as an installment purchase contract) against the capital investment apportionment of the Federal Telecommunications Fund.

Matter of: GSA Procurement of Equipment Under 40 U.S.C. 481(a)(3), July 21, 1983:

This decision is in response to a request from Leroy P. Boucher, Director of Finance, Office of Plans, Programs and Financial Management, General Services Administration (GSA), requesting a decision under 31 U.S.C. § 3529 as to the propriety of, and the funding treatment to be accorded to, a contract awarded to Centel Communications (Centel) to provide telephone equipment and related services to Federal offices located in the Denver, Colorado area. As we will explain in more detail below, GSA, in reliance upon authority contained in 40 U.S.C. § 481(a)(3), has entered into a long term lease-purchase contract (which is in reality an installment purchase contract) for equipment and related services from Centel and is financing its contract obligations by using the Federal Telecommunications Fund (Fund) established by 40 U.S.C. § 757. GSA plans to obligate the Fund for its costs under the contract annually, rather than obligating the total estimated costs under the contract at once.

Specifically, we have been asked:

1. Whether the procurement of equipment and related services should properly be considered one for utility services within 40 U.S.C. § 481(a)(3);

2. Whether the lease-purchase agreement should be capitalized as an installment purchase for the equipment and installation portion;

3. Whether GSA should be required to obligate the total cost of equipment and installation at the time of capitalization or annually as the services are provided and paid for; and,

4. Whether the obligations incurred should be reported against the Fund's "normal operations" or its "capital investment" apportionment?

For the reason stated below, we find that the contract may be considered one for public utility services within 40 U.S.C. § 481(a)(3); the contract should be capitalized for financial reporting purposes as an installment purchase; the costs should be obligated against the Fund annually; and, the obligations should be reported against the Fund's capital investment apportionment.

Background

Solicitation No. CDPW-79-00031-7-W7 was issued on February 5, 1980, to acquire a fully automatic telephone switching system and associated installation and maintenance services to satisfy the incidental day-to-day telephone communication requirements of Federal agencies in the Denver, Colorado area.

Paragraph T-402 of the solicitation specified that the Government intended to award a contract for the initial term of 60 months plus installation lead time from date of award, and that a contract life of 120 months was contemplated through the exercise of successive renewal options after the initial term, said options not to exceed 12 months each until the 120 month contract life was completed. In no event would the total contract term exceed 10 years (120 months) from the date of award (T-404).

The solicitation is a model request for proposals (RFP) developed by GSA for use in its competitive telecommunications program. The Denver requirement is expected to be satisfied by a proposed system containing 6,000 main stations, with a forecasted growth to 13,000 main stations during the contract life.

Three proposals were received. One of the offers was from the local franchised telephone company, the other two were from nontariffed suppliers (interconnects). Interconnects provide service through attachment of their or other companies' equipment to tariffed telephone networks. Centel, an interconnect, submitted the lowest overall cost proposal, a lease offer that included an option to purchase the equipment at the end of 5 years of system operation for $1. Contract GS-00C-70057 was awarded to Centel on May 14, 1982, for an estimated 5-year cost of $120,303,798.

While it is clear that the Fund is available to purchase, install, and maintain the equipment in question,[1] the Fund has insufficient

[1] 40 U.S.C. § 757 provides that:

"There is authorized to be established on the books of the Treasury, a Federal telecommunications fund, which shall be available without fiscal year limitation for expenses, including personal services, other costs, and the procurement by lease or purchase of equipment and operating facilities (including cryptographic devices) necessary for the operation of a Federal telecommunications system, to provide local and long distance voice, teletype, data, facsimile, and other communication services. There are authorized to be appropriated to said

resources to permit GSA to obligate the estimated total cost of the first 5-year term under the agreement. Consequently, unless authority may be found elsewhere for GSA to contract in advance of, or in excess of, appropriations, the agreement would be in violation of the provisions of the Antideficiency Act, 31 U.S.C. § 1341, and 41 U.S.C. § 11.[2] See for example our decision in the matter of the *General Services Administration's General Supply Fund,* 60 Comp. Gen. 520 (1981). This would be true whether we characterized the agreement as an installment purchase contract or a lease-purchase agreement for purposes of financial reporting.[3] GSA's General Counsel contends that the necessary "contract authority," *i.e.,* authority to commit the Government in advance or in excess of appropriations, may be found in 40 U.S.C. § 481(a)(3).

Applicability of 40 U.S.C. § 481

Section 201(a)(3) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 481(a)(3) provides that:

> (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—
>
> * * * * * * *
>
> (3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1) of this subsection: *Provided, That contracts for public utility services may be made for periods not exceeding ten years;* * * * [Italic supplied.]

The purpose of the proviso authorizing contracts for public utility services to be made for up to 10 years is to permit GSA to take advantage of discounts offered under long term contracts.[4] If this provision is applicable, GSA need not have available to it budget authority to obligate the total estimated cost of the Centel contract, but only sufficient budget authority to obligate its annual costs under the agreement.[5]

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fund such sums as may be required which, together with the value, as determined by the Administrator, of supplies and equipment from time to time transferred to the Administrator under authority of section 486(f) of this title, less any liabilities assumed, shall constitute the capital of the fund * * *."

Thus we are not faced with the issue of funding source, as was the case in 35 Comp. Gen. 220 (1955).

[2] 31 U.S.C. § 1341 provides:

"(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) Make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) Involve either government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law."* [Italic supplied.]

41 U.S.C. § 11 provides:

"(a) No contract or purchase on behalf of the United States shall be made, *unless the same is authorized by law* or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which however, shall not exceed the necessities of the current year. * * *." [Italic supplied.]

[3] See our decision in the matter of the *Navy Industrial Fund: Obligations in connection with long-term vessel charter,* 62 Comp. Gen. 143 (1983), and 48 Comp. Gen. 497 (1969).

[4] See Report of the Conference Committee on H.R. 4754, Rep. No. 935, 81st Cong., 1st Sess., 34 (1949) and the Report of the Senate Committee on Expenditures in the Executive Departments on S. 2020, Rep. No. 475, 81st Cong., 1st Sess., 14 (1949).

[5] See 35 Comp. Gen. 220 (1955) and 44 Comp. Gen. 683, 687-688 (1965). Thus there is no "full funding" requirement for long term utility contracts but instead these may be funded incrementally. Compare our decision in the matter of *Newport News Shipbuilding and Dry Dock Company,* 55 Comp. Gen. 812, 822-823 (1976).

The contract with Centel envisions the procurement of telephone equipment as well as services. In fact, as we will discuss in more detail below, it is an installment purchase contract. Thus the question to be resolved is whether this installment purchase contract may properly be considered a contract for "public utility services" within 40 U.S.C. § 481(a)(3).[6]

GSA in support of its contention that procurement of telephone equipment and related services are public utility services argues that:

When the Property Act was passed, telephone services were only available from regulated telephone companies. Services were furnished under approved tariff prices, terms and conditions. Unlike other utilities such as gas, water and electric, where the commodity provided is consumed, telephone services included the provision of various terminal (phone sets) and ancillary (switchboards) equipment. Although one needed an electrical appliance to consume electricity and the appliance is somewhat analogous to the phone, the electrical appliance was not provided by the utility whereas the phone instrument was. The dial phone was subject to regulation while gas, electric and water consuming equipment was not. If one wanted telephone service one could only get it through equipment supplied by the telephone company.

In 1968, the Federal Communications Commission (FCC) decided that equipment available from nonregulated suppliers could be attached to or interconnected with equipment and systems furnished by regulated carriers. (*Carterfone,* 13 FCC 2d 480, June 27, 1968, 1CLSR 1019). This decision opened a new market for potential suppliers of telecommunications equipment. In 1974, GAO issued a far reaching decision which held that GSA was required to obtain competition to the maximum extent practicable in the procurement of public utility services. *RCA Alaska Communications, Inc.,* * * * [B-178442, June 20, 1974].

In response to the RCA decision GSA established a competitive procurement program for telecommunications services. A model RFP was developed containing evaluation criteria designed to place the regulated carriers and nonregulated suppliers on equal footing. The first contract awarded under this program was to an interconnect for the outright purchase of a 500 main station system for the Veterans Administration in Albuquerque, New Mexico. Approximately 60 contracts have been awarded under our competitive procurement program. Sixty percent of these contracts are with interconnect companies; 50 percent of that number were for purchase or lease with an option to purchase. * * * In the Denver procurement GSA estimates it will save the Government 9.3 million dollars over the contract life by awarding to Centel.

Traditionally, the tariffed companies did not offer equipment for purchase. This was a matter of policy rather than regulation. When a utility company seeks an increase in revenue before a regulatory commission, the granting of such increase is a function of the company's rate base (investment in capital assets) and the current cost of money. Regulated telephone companies have chosen to increase their potential for maximizing revenues by keeping telephone equipment in the rate base. Under the regulated telephone company's policy, GSA does, in fact, pay for the full capitalization costs of the equipment but does not acquire title. In contrast to the regulated carriers, interconnects have offered equipment for either lease or purchase. For cash flow reasons, interconnects do not want to tie up their capital. In most cases the interconnects depend heavily on bank financing.

It has been the position of GSA that the contracts which we enter into for telephone services are public utility services contracts regardless of whether the successful offeror was a tariffed carrier or an interconnect company. GSA has viewed the equipment involved in telecommunications procurements as incidental to the service. Historically, this was a reasonable determination since: (1) a single RFP culminating in the same term of contract was necessary to evaluate the available competition; (2) the ten-year contracting authority has always been available to use with the predominant offeror (the tariffed carriers) due to the expected economic advan-

[6] While this question concerning whether purchases of equipment are within the scope of the law has been before this Office on two other occasions, this is the first time that we will have the opportunity to decide it. See our decisions in the matter of the *General Telephone Company of California,* 57 Comp. Gen. 89, 96-97 (1977) and B-159559, July 29, 1966.

tage to the government; (3) that which was being offered by all offerors and ultimately contracted for to meet this requirement was the same; (4) the economic advantage to the government in using the ten-year authority was of the same kind for the same reasons, regardless of who was the successful offeror; and (5) the contract was fundamentally for the delivery of a public utility services.

* * * * * * *

GSA has historically regarded the equipment provided with telephone services as an incidental but necessary element of the services. Thus, we have always considered the acquisition of equipment as falling within the meaning of contracts for public utility services. * * *

We believe our interpretation reasonable since in the provision of telephone services, there is a substantial initial capital investment in equipment. A multiyear commitment by the Government facilitates long term amortization of capital costs which in turn reduces risks and results in lower prices to the Government. Such investment in equipment is characteristic of the telecommunications industry, regardless of whether the supplier is a regulated company or interconnect.

The service is delivered through the use of the equipment. Whether the service is provided by utility-owned equipment or Government-owned equipment does not change the nature of the service.

The 1949 Act is silent as to what is meant by the term "public utility service" and the meager legislative history on the provision does not shed any additional light on the scope of the statutory term itself. However, in describing what constitutes a public utility, one court has stated:

* * * The trend of modern decisions is to describe rather than define a public utility as being a business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation or telephone or telegraph service. * * * *Gulf State Utilities Co. v. State,* 46 S.W. 2d 1021 (Tex. Civ. App., 1932).

Further, while public utilities are generally described as providing services, we think that the concept of utility services can include the sale of a product or equipment as well as providing services in the literal sense.[7]

This Office has generally adopted a pragmatic and flexible approach in interpreting the authority conferred by 40 U.S.C. § 481(a)(3). In the matter of *Evan Jones Coal Co.,* 45 Comp. Gen. 59 (1965), a protester contested the use of the 10-year authority delegated by GSA to the Department of Defense on the grounds that the authority was available to contract only with "regulated monopolistic public utility businesses." We held that:

The status of the Pipeline Company as a public utility under Title 42 of the Alaska Statutes is, in our opinion, doubtful. We are of this view because the company is not subject to regulatory control and because it has not served the public generally with natural gas. *But the Congress has authorized long-term contracting in the case of services having public utility aspects.* In doing so the Congress did not require that these public utility services be procured only from those firms which clearly come within the strict legal definition of a public utility. Perhaps in recognition of the legal imponderables involved in the application and enforcement of State laws regulating public utilities, and in view of the diversity of opinions between various jurisdictions respecting the legal character of public utilities, the Congress in its judgment determined to categorize the service rather than the contractor. Since gas is by definition a utility, and since the contract provides for the furnishing of

[7] See *K.S.B. Technical Sales Corp.* v. *North Jersey District Water Supply Commission of the State of New Jersey,* 376 A. 2d 960 (N.J. Super. Ct., 1977); *Helvey* v. *Wabash County REMC, 278 N.E. 2d 608 (Ind. Ct. App., 1st Dist., 1972) and cases collected at 48 ALR 3d 1060.*

public utility gas services, we would not feel required to question the statutory authority for the contract. [Italic supplied.] 45 Comp. Gen. at 64.

Thus it is the *nature of the product or service provided* and not *the nature of the provider of the product or services* that governs the application of 40 U.S.C. § 481(a)(3). Furthermore, the concept of what product or service constitutes a public utility service is not static [8] for the purpose of statutory construction, but instead is flexible and adaptive, permitting statutes to be construed in light of the changes in technologies and methodologies for providing the product or service.[9] Finally, it is also clear that while a particular activity may be a public utility service for the purpose of one law, the same activity may not be a public utility service for the purpose of another law.[10]

On the basis of these fundamental premises, we think that the sale of telephone equipment or facilities with related services is a public utility type service just as much as leasing the equipment to the Government at a rental designed to recover the cost of the contractor's investment in facilities and equipment over the life of the rental agreement would be.[11] The only difference between the two is that in the former case the Government acquires title to the system while in the latter, title remains with the utility. Thus the nature of the service is virtually identical, and in any case, the difference is not so fundamental as to warrant its exclusion from the scope of transactions to which the authority of 40 U.S.C. § 481(a)(3) applies. Consequently, we have no objection to the Centel agreement as being in excess of GSA's authority under the statute.

Capitalization

Concerning the second question as to whether the Centel contract should be capitalized as an installment purchase contract for financial reporting purposes, we note that 2 GAO 12.5(d) dealing with accounting for assets provides in part:

Property acquired under installment contracts

The property should be capitalized at the time of receipt or acceptance by the Government rather than periodically as payments are made or when title passes to the Government. The amount capitalized should include the purchase price plus related costs. for example, costs incurred for site preparation, installation, and similar costs related to making the equipment ready for use, incurred separately from the installment purchase contract or separately identified for payment in the contract, should be capitalized when incurred. (See also section 13.5.)

Property acquired under lease purchase contracts

Property acquired under lease purchase contracts should be capitalized at the time the option to purchase is exercised. The amount capitalized will normally be

[8] This is a reasonable interpretation of the statute since its purpose is to effect economy and improve services. By broadly construing the authority conferred, it increases the potential number of suppliers, thereby increasing competition which should result in reduced costs or increased services or both.

[9] See *Radio Common Carriers of New York, Inc.* v. *New York Public Service Commission*, 360 N.Y.S. 2d 552, 555–557 (S. Ct. Alb. County, 1974).

[10] Compare *Classified Directory Subscribers Association* v. *Public Service Commission of the District of Columbia*, 383 F. 2d 510 (D.C. Cir., 1967) with *District of Columbia* v. *Cheasapeake & Potomac Telephone Co.*, 179 F. 2d 814 (1950).

[11] That the Government could pay such rental rates is equally clear. See our decision B–159559, June 19, 1967, and decisions cited therein.

the purchase price stipulated in the contract less any cumulative allowances. Property acquired under lease purchase contracts which are in fact installment contracts (the decision to purchase having already been made) will be treated for capitalization purposes as installment purchases. (See also section 13.5.) [12]

We note that GSA's General Counsel has indicated that the Centel contract is considered an installment purchase contract and will be capitalized as such for financial reporting purposes notwithstanding its characterization as being a lease with an option to purchase.[13] Early termination of the contract vests title of the property in the Government while the acquisition cost after the full 5-year term is $1. Thus it is a virtual certainty that GSA will exercise its right to buy the equipment at the expiration of the contract term or acquire title to the equipment prior thereto. Thus treatment of the contract as an installment purchase contract for financial reporting purposes is proper.

Obligating Costs

As we have indicated above, GSA need not obligate the total estimated cost of the contract against the Fund, but only amounts necessary to cover its annual costs under the contract. Furthermore, they should be obligated against the Fund's "Capital Investment" category B apportionment, as GSA's General Counsel has indicated. Installment of the phone system in the Denver Federal Center and specific off premises locations will improve the long term usefulness and productivity for the facilities serviced. See 2 GAO 12.5 (d) & (e).[14]

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[12] 2 GAO 13.5 dealing with accounting for liabilities under installment or lease-purchase contracts provides:
"The purchase price included in installment or lease-purchase contracts, which are in substance installment purchases, shall be recorded as a liability when the property is received or accepted from the contractor. For lease-purchase contracts, the purchase price shall be recorded as a liability when the option to purchase is exercised."

[13] We note that GSA's General Counsel has pointed out that the model RFP contains a number of service requirements which reinforce the application of our 10-year authority to these acquisitions. These service requirements call for the furnishing, engineering, installation, and maintenance of a complete operational in-service automatic telephone switching system. This includes switching equipment, instruments, intrasystem cabling and tie-lines, and interconnection with the local telephone system, the Federal Telecommunications System (FTS) network and commercial long-distance lines. After initial installation the contractor, whether the tariffed carrier or an interconnect, continues to be responsible for a long list of follow-on services, including:
(1) Main station installation, removal, or relocation.
(2) Extension station installation, removal or relocation.
(3) Telephone instrument (multiline, single line) installation, removal or relocation.
(4) Installation, removal or replacement of lights and other multiline instrument features.
(5) Installation of Central Office trunk terminals, tieline terminals, access lines, and all other related system switching equipment.
(6) Augmentation of switching equipment and console components as necessary for system expansion to meet growth requirements and/or to maintain the specified grade of service.
(7) Preventive routine and remedial maintenance.
(8) Traffic and usage studies.
(9) Maintenance of line record cards, house cable records, feature assignment records, system test records, trouble report records, measurement and performance data.
(10) Engineering and consulting services in support of the system when formally requested by the Government.
(11) Follow-on services for installation and removal of features and restrictions.
However, while services are clearly a part of the procurement, the contract is admittedly primarily one for the procurement of the equipment.

[14] While the distinction between capitalized expenditures and current expenses is not always clear, here the procurement, of the telephone equipment qualifies as a betterment rather than merely repair and maintenance.

[B-209485]

General Accounting Office—Jurisdiction—Contracts—Disputes—Between Private Parties

Protest that a competitor allegedly used the protester's proprietary data in its proposal presents a dispute between private parties that is not for consideration under General Accounting Office's (GAO) Bid Protest Procedures where the contracting agency did not participate in the alleged disclosure of the data.

Criminal Law Violations—Not for GAO Consideration

Allegation that a competitor's proposal contains false representations in violation of 18 U.S.C. 1001, a criminal statute, raises a matter outside GAO's bid protest function. Nevertheless, if a protester establishes that an offeror made misrepresentations in its offer that materially affected the evaluation, corrective action would be appropriate.

Contracts—Negotiation—Offers or Proposals—Best and Final—Technical Changes, etc. Not Precluded

Request for best and final offers stating that no technical revisions are desired cannot reasonably be interpreted as precluding technical revisions that might make a proposal more competitive. Absent express contrary instructions, offerors should know that changes to their technical proposals are permitted in best and final offers.

Contracts—Negotiation—Requests for Proposals—Evaluation Criteria—Subcriteria—Encompassed Within Major Criteria

Agency's evaluation of technical proposals for the offeror's "Approach/Understanding of Tasks" was reasonable even though the subfactor was not expressly listed in the solicitation. While an agency must identify every major evaluation factor, it need not specify the various aspects of the major criteria, provided the aspects are reasonably related to, or are encompassed by, the stated criteria, which the record clearly shows is the case here.

Contracts—Negotiation—Awards—Price Determinative Factor

Where request for proposals lists the relative weights of the major evaluation criteria, but not the precise weights, there is no requirement that award be made to the offeror whose proposal receives the highest numerical ranking, or that selection officials adhere to the precise weights recommended to them by their advisers. Where selection officials, after evaluating proposals on a basis clearly consistent with the solicitation's scheme, reasonably regard proposals as essentially equal technically, cost or price may be the determinative selection factor, absent justification for an award to a more costly offeror.

Contracts—Negotiation—Offers or Proposals—Evaluation—Competitive Range Exclusion—Reasonableness

GAO will not question an agency's technical evaluation or determination whether a proposal is in the competitive range unless shown to lack a reasonable basis or to violate procurement statutes and regulations. The protester's mere disagreement with the agency's judgment does not meet its burden of showing the agency's technical evaluation and competitive range determination were unreasonable.

Contracts—Negotiation—Offers or Proposals—Evaluation—Cost Realism Analysis—Adequacy

Contracting agency's analysis of proposals for cost realism involves the exercise of informed judgment, and GAO therefore will not disturb a cost realism determination unless it is shown to lack a reasonable basis. Where the contracting agency independently reviewed the cost realism of offers against a Defense Contract Audit

Agency's report based in part on the actual costs of prior performance, the analysis is not legally objectionable where no specific errors are alleged.

Matter of: SETAC, Inc., July 25, 1983:

SETAC, Inc. protests the Navy's award of a cost-plus-fixed-fee contract to Frontier Engineering, Inc. to provide technical engineering support services for 1 basic year and 2 separate option years at the Tactical Aircrew Combat Training Systems, Fleet Analysis Center (FLTAC), Corona, California. The contract was awarded under request for proposals (RFP) No. N00123-82-R-0827, which was set aside for small business concerns. Only two such firms—SETAC, the incumbent contractor, and Frontier Engineering—submitted offers. In response to discussions, SETAC offered a total cost of $3,555,599, and Frontier a cost of $2,784,250. Although the solicitation listed technical factors above cost in order of importance and SETAC received a technical score of 555 out of a possible 700 as opposed to Frontier Engineering's score of 529, the Navy determined the cost advantage of Frontier Engineering's proposal outweighed the technical advantage of SETAC's proposal. SETAC basically contends that the Navy's determination was unreasonable, and particularly complains that the Navy failed to downgrade Frontier Engineering's technical proposal for misstatements of the firm's qualifications and experience. SETAC also raises other protest grounds, including a complaint that FLTAC discouraged SETAC from changing its technical proposal during negotiations.

We dismiss the protest in part and deny it in part.

I. BACKGROUND

A. *The Solicitation.*

The solicitation's scope of work included a list of broad tasks, and provided precise minimum qualifications and level-of-effort estimates for certain labor categories—program manager, senior project engineer, project engineer, senior engineer, electronics engineer, data technician, and more. The offeror's proposed labor rates times the estimated manhours for each category, plus the offeror's proposed fee, basically provided the basis for a cost evaluation. In addition, offerors were to submit separate technical and cost proposals for a separate evaluation of technical acceptability and to permit a cost realism analysis.

For award purposes, the solicitation listed three evaluation criteria in descending order of importance—Personnel, Management, and Cost. The first two criteria composed the major technical criteria. The Personnel criterion required résumés demonstrating the qualifications and experience of the personnel proposed to perform the work. The Management criterion required a description of management personnel's capabilities in the management of technical programs similar to those required by the solicitation. This criterion also stated that the offeror must submit a brief management plan indicating the controls that would be exercised to effectuate

timely performance and cost effectiveness under the contract, and including the proposed lines of responsibility, authority and communication within the proposed organization and in relation to the present organization.

Under the Cost criterion, the solicitation advised offerors that although cost was the least important factor, it nonetheless was important, and that "the degree of its importance will increase with the degree of equality of the proposals in relation to the other factors on which selection is to be based." The Cost factor involved an evaluation of the total cost to the Government, including an evaluation of the cost realism of the offeror's proposed costs.

B. *Evaluation and Discussions.*

The technical evaluators reviewed initial technical proposals using the following evaluation matrix:

	Maximum Points
A. Technical:	
1. Personnel Qualifications	400
2. Approach/Understanding of Tasks	120
3. Company Experience	90
4. Management Plan	90
Total	700
B. Cost	300

The Navy reports (and the evaluation summaries indicate) that the technical factors numbered 2 through 4 were subfactors of the Management criterion listed in the solicitation. Thus, the relative importance of the major evaluation criteria listed in the solicitation was Personnel—40 percent, Management—30 percent, and Cost—30 percent.

Initial technical proposals received the following scores:

Factor	Max Points	SETAC	Frontier Engineering
Personnel Qualifications	400	316	264
Approach/Understanding of Tasks	120	89	103
Company Experience	90	83	80
Management Plan	90	67	82
Total		555	529

SETAC received a relatively low score under the Management Plan subfactor because it proposed three managers for the contract work who are also line managers in the SETAC corporate structure, raising the possibility of conflicts that might interfere with the performance of assigned contract tasks. The evaluators downgraded SETAC's score for Approach/Understanding of Tasks because a majority of the evaluators felt that SETAC did not respond specifically to all the major task descriptions outlined in the solicitation.

Notwithstanding that SETAC received a slightly higher technical score than did Frontier Engineering, the evaluators recommended that cost be the deciding selection factor since both offerors were deemed technically acceptable and there was no significant difference between the technical merits of the two offerors' proposals. In this regard, the cognizant Navy procurement officials decided that the noted deficiencies were minor and not readily correctable during discussions.

Concerning the initial cost proposals, the Defense Contract Audit Agency questioned $78,000 of SETAC's proposed base year costs of $1,193,089, and determined Frontier Engineering's proposed costs of $886,505 to be reasonable. The contracting officer conducted negotiations with both offerors, in part to resolve the $78,000 question about SETAC's offer. By letter, the contracting officer requested a best and final offer from both firms. The letter cautioned the offerors that proposed costs would be evaluated only for the basic contract period, although proposals had to demonstrate the reasonableness of option year costs. The letter also stated that, because the evaluation of technical proposals resulted in a finding that essential technical equality existed between offerors and whatever deficiencies existed were minor, no further technical information or revisions were desired. Offerors were cautioned that any such information had little or no potential to affect their technical standing.

In response, SETAC revised its cost proposal in a manner that the Navy considered to be realistic, and revised its technical proposal by replacing two proposed personnel and adjusting the hours of its project engineer. The Navy considered these changes to be minor, and they therefore had no effect on SETAC's technical score. Frontier Engineering made no technical changes. Thus, the offerors' technical scores were unchanged.

The Navy then evaluated best and final offers using a "normalization" method, that is, giving the highest ranked proposal in each of the two areas of technical ability and cost the maximum number of points available in those areas, and the other offer a fraction of the maximum score for each area in the same proportion as the offerors' raw scores. *See Francis & Jackson, Associates,* 57 Comp. Gen. 244 (1978), 78-1 CPD 79. Thus, Frontier Engineering scored the full 300 points for cost and 667.21 for technical ability, whereas

SETAC scored 234.51 for cost and the full 700 for technical ability. The overall (technical plus cost) scores were 967.20 for Frontier Engineering, and 934.50 for SETAC.

The Navy, based in part on the technical evaluators' recommendation that cost be the deciding award factor, determined that SETAC's slightly higher technical score (4 percent higher than Frontier Engineering) did not justify its approximately $245,000, or 27 percent higher cost, and therefore made an award to Frontier Engineering.

II. ANALYSIS

A. *Awardee's Qualifications and Alleged Use of Protester's Proprietary Data.*

SETAC's principal complaint is that Frontier Engineering allegedly misrepresented its prior experience and used SETAC's proprietary data in its proposal. According to the protester, Frontier Engineering's president and two full-time employees had been SETAC employees who left SETAC to go into business on their own. The protester alleges that these individuals took proprietary data with them that they used in preparing Frontier Engineering's proposal. SETAC also complains that the proposal falsely describes Frontier Engineering as "a SETAC affiliate," and that the proposal cites prior SETAC contracts to demonstrate the firm's experience even though none of Frontier Engineering's employees significantly participated in the performance of the contracts. In SETAC's view these allegedly false statements violate 18 U.S.C. § 1001 (1976), a criminal statute, and should provide a basis for rejecting Frontier Engineering's offer.

Frontier Engineering's allegedly improper use of the protester's proprietary data does not provide a basis for our objecting to an otherwise valid award. A competitor's alleged use of another firm's data presents a dispute between two private parties that is not for consideration under our Bid Protest Procedures. *Resource Development Institute, Inc.,* B-196204, October 10, 1979, 79-2 CPD 245. The courts, rather than this Office, are the appropriate forum to determine the parties' rights regarding allegedly proprietary data. *Telemechanics, Inc.,* B-203428, B-203643, B-204354, October 9, 1981, 81-2 CPD 294. We dismiss this aspect of the protest.

Concerning the alleged violation of 18 U.S.C. § 1001, which imposes criminal penalties for knowingly making false statements to the Government, such matters are outside the scope of our bid protest function and should be referred to the Department of Justice. *See E.C. Campbell, Inc.,* B-204253, February 2, 1982, 82-1 CPD 76.

Nevertheless, where it is established that an offeror made intentional misrepresentations that materially influenced the agency's consideration of its proposal, the proposal should be disqualified, *see Informatics, Inc.,* 57 Comp. Gen. 217 (1978), 78-1 CPD 53, or the contract canceled where an award has been made. *See New Eng-*

land Telephone and Telegraph Company, 59 Comp. Gen. 746 (1980), 80-2 CPD 225; 49 id. 406 (1966). Moreover, a contract could be terminated for the convenience of the Government where misrepresentations materially influenced the agency's consideration of the contractor's proposal, but it cannot be established that the misrepresentations were intentional *See New England Telephone and Telegraph Company, supra.*

In this case, however, the protester has not established that Frontier Engineering's proposal contained misrepresentations. The allegations—that Frontier Engineering was not a SETAC affiliate and that it misrepresented certain of its proposed employees' experience—are unsupported. The burden is on the protester to present evidence affirmatively establishing its case, and unsupported allegations do not meet that burden. *Cas Turbine Corporation,* B-210411, May 25, 1983, 83-1 CPD 566.

B. *Allegedly Misleading Discussions.*

SETAC states that upon receipt of the request for best and final offers it sought clarification from the contracting office. The protester alleges that it was told that technical scores were not equal, and SETAC's superior score therefore could justify an award to it rather than to an offeror whose proposal was lower priced but was not ranked as highly for technical ability. SETAC asserts that this reassurance and the statement in the Navy's letter that no technical revisions were desired caused SETAC not to change its mix of technical personnel in a manner that would have permitted SETAC to reduce its cost. The same Navy contracting activity, alleges the protester, had admonished SETAC in a previous procurement about changing a technical proposal after discussions in which the activity had stated no technical revisions were desired.

The Navy responds that SETAC was free to make technical changes to its proposal, and denies that any contracting official advised the protester that its technical superiority provided a basis for an award to SETAC.

We have held that, absent express contrary instructions, offerors should know that changes to their technical proposals are permitted in best and final offers. *Systems Group Associates, Inc.,* B-198889, May 6, 1981, 81-1 CPD 349. If the protester means to argue that the language of the letter requesting best and final offers could be interpreted as prohibiting technical revisions, we believe that such an interpretation is unreasonable. The letter did not prohibit technical revisions, but merely stated that none were desired in light of the essential equality of technical proposal and the lack of any major deficiencies in the proposals. The plain meaning of the advice in the letter that no further technical information or revisions were desired is that the Navy did not require any revisions to remedy deficiencies or significant weaknesses in the offeror's technical proposals, not that the agency actually was precluding revisions that offerors thought would enhance their competitive posi-

tions. Moreover, the record indicates the protester did not interpret the request for best and final offers to prohibit technical revisions, since SETAC's best and final offer included revisions to its technical proposal—as stated previously, SETAC replaced two proposed personnel and adjusted the hours of its project engineer. We therefore cannot conclude, on the record presented, that SETAC was misled by the Navy's request for best and final offers.

The only evidence on the protester's disputed allegation that a contracting official informed SETAC that its proposal was sufficiently technically superior to justify an award to SETAC is the conflicting statements of the protester and the contracting agency. In such a case, we are constrained to accept the contracting agency's version of the facts, because the protester has failed to meet its burden of proof. *See Photonics Technology, Inc.,* B-200482, April 15, 1981, 81-1 CPD 288.

SETAC's allegation that contracting officials had previously admonished it for including technical revisions in its best and final offer, where the request for such offers stated no technical revisions were desired, is unsupported and, more importantly, has no relevance to this protest. The protester has failed to show that the circumstances in the prior procurement had any similarity to those in this case, and thus has failed again to meet its burden of proof.

We therefore deny the protest as it relates to allegedly misleading discussions.

C. Evaluation of Technical Ability Versus Cost.

SETAC argues it should have received the award because of its alleged technical superiority notwithstanding its more costly proposal. The protester complains that the FLTAC technical evaluators failed to adhere to the evaluation factors and weights originally recommended by the FLTAC personnel who prepared the requisition for the engineering support services. The requisition included a recommended evaluation plan where the Personnel factor was weighted 60 percent, Management 30 percent, and Cost 10 percent. SETAC contends that adherence to this scheme would have resulted in a greater discrepancy between SETAC's higher ranked technical proposal and Frontier Engineering's, which allegedly would have justified an award to SETAC despite the greater cost. SETAC further complains that the Navy added a new factor to the evaluation scheme, Approach/Understanding of Tasks, that was not included in the plan accompanying the requisition.

SETAC's complaint that the FLTAC technical evaluators failed to use the numerical evaluation weights recommended in the requisition does not present a proper basis to object to an otherwise valid award. Selection officials are relatively free to determine the manner in which proposals will be evaluated so long as the method selected provides a rational basis for a source selection, and the actual evaluation comports with the established evaluation criteria stated in the solicitation. *Boone, Young & Associates, Inc.,* B-

199540.3, November 16, 1982, 82-2 CPD 443. Here, the relative weights assigned to the various evaluation factors simply were listed in the RFP in descending order of importance (precise weights for each factor were not indicated), and the evaluation weights assigned obviously were consistent with that scheme. The fact that the agency may have considered another evaluation scheme at some point provides no legal basis to object to an evaluation that was consistent with the basis on which offers were invited. *See Bunker Ramo Corporation,* 56 Comp. Gen. 712 (1977), 77-1 CPD 427.

As to the decision to accept the lowest cost proposal instead of the one that received the most technical evaluation points, point scores are merely guides for decision-making by source selection officials whose responsibility it is to determine whether technical point advantages are worth the cost that might be associated with a higher scored proposal. *Telecommunications Management Corp.,* 57 Comp. Gen. 251 (1978), 78-1 CPD 80. Selection officials therefore have broad discretion in determining the manner and extent to which they will make use of technical or cost evaluation results, and may make cost/technical tradeoffs. *Id.* We have recognized that where cost is assigned points as an evaluation factor along with other factors, the fact that a proposal receives the highest number of points does not in itself justify acceptance of the highest scored proposal without regard to price. *The Jonathan Corporation,* B-199407.2, September 23, 1982, 82-2 CPD 260. The designation of cost or price as a subsidiary evaluation factor means only that where there is a technical advantage associated with one proposal, that proposal may not be rejected merely because it is higher in price. It does not mean that, when technical proposals are deemed to be essentially equal, price or cost will not become the controlling factor. *Lockheed Corporation,* B-199741.2, July 31, 1981, 81-2 CPD 71.

Indeed, cost cannot be ignored by an agency in the selection process. *Lockheed Corporation, supra.* Where selection officials reasonably regard proposals as being essentially equal technically, cost or price becomes the determinative factor in awarding a contract no matter how it is weighted in the evaluation scheme, absent explicit justification for an award to a more costly offeror. *CompuServe Data Systems, Inc.,* B-206274, May 20, 1982, 82-1 CPD 482; *see also The Jonathan Corporation, supra.* The RFP in this case essentially informed all offerors of this fact by stating, in the section announcing the evaluation criteria, the following:

> Although cost is the least important factor, it is an important factor and should not be ignored. The degree of its importance will increase with the degree of equality of the proposals in relation to the other factors on which selection is to be based.

Thus, the Navy had the right to make an award on the basis of cost because it determined that the protester's and Frontier Engineering's offers were essentially equal technically. *See Bunker Ramo*

Corporation, supra. We will discuss whether the Navy properly determined the proposals to be essentially equal in the next section.

Concerning the evaluation of offers for Approach/Understanding of Tasks, the Navy asserts that the criterion was a subfactor of the major Management criterion listed in the RFP. The evaluation documents, which we have examined, show that to be the case. While it is well settled that the evaluation and evaluators must conform to the scheme set forth in the solicitation, the procuring agency is not required to identify the various aspects of the major criteria, provided that the aspects are reasonably related to, or are encompassed by, the stated critieria. *Human Resources Research Organization,* B-203302, July 8, 1982, 82-2 CPD 31.

We believe that the offeror's demonstrated understanding and approach to tasks is reasonably related to the requirements established by the Management criterion, especially the requirement for a management plan. Moreover, the solicitation specifically advised offerors that "the technical proposal should be sufficiently specific, detailed and complete to clearly and fully demonstrate that the offeror has a thorough understanding of the requirements for, and technical problems inherent in, the achievement of the specifications and work program," and that the offeror "has a valid and practical solution for each contemplated problem." The solicitation further required a complete explanation of the offeror's proposed procedures and techniques. We therefore see nothing unfair in this aspect of proposal evaluation.

D. Fairness of the Technical Evaluation.

SETAC argues that the technical evaluators were inconsistent in their evaluation of the two proposals, since the evaluators deducted points from SETAC's score under the Management Plan subfactor because SETAC assigned certain line managers within their organization to perform contract-management tasks, but did not disqualify as unacceptable Frontier Engineering executive managers who were assigned to key positions.

The evaluators further erred, argues the protester, by failing to disqualify Frontier Engineering for deficiencies noted in the evaluation summary. The evaluators noted that three of the offeror's employees were assigned to tasks for which they lacked the precise qualifications required by the solicitation, and that the firm would require a learning period for some tasks and some additional managerial support for logistics. The evaluators also noted that Frontier Engineering had not yet obtained a facility in Corona, California, as required by the solicitation. In this regard, SETAC complains that Frontier Engineering had also failed to obtain a facility in the Washington, D.C. area as also required by the solicitation.

In response, the Navy points out that both SETAC and Frontier Engineering had points deducted for assigning line managers or managers to working-level tasks. In SETAC's case, the Navy deducted 23 points out of a possible 90 under the Management crite-

rion for this and other deficiencies concerning SETAC's proposed management plan. The deficiency was also noted in the narrative evaluation summary. According to the Navy, 8 points were deducted from Frontier Engineering's Management score including some points for the same type of deficiency. Regarding its alleged failure to reject Frontier Engineering's initial proposal and to disqualify certain of Frontier Engineering's personnel for failure to meet qualifications required by the solicitation, the Navy reports that while the evaluators noted that Frontier Engineering had proposed assigning three individuals to tasks for which they lacked the precise qualifications required by the RFP, nothing in the evaluation scheme required that the Navy reject the offer for that reason.

The Navy explains that its major concern under the Personnel category was to ensure that proposed individuals meet the minimum requirements for each specified position, *e.g.,* the RFP specifically required a program manager, senior project engineer, a senior engineer, and an electronics engineer, and those failing to meet the requirements for those positions received no points at all. Frontier Engineering's proposed project engineer fell into this category and thus received no points. Another evaluation concern was that personnel proposed for tasks, although meeting the minimum requirements for their positions, possess qualifications making them well suited to perform the tasks. Thus, the Navy felt that although Frontier Engineering's proposed senior project engineer and data technicians met the requirements the RFP contained for those positions, these personnel were not properly assigned to several tasks. For this reason, points were deducted from Frontier Engineering's Personnel score for these individuals.

We do not independently determine the relative merits of proposals since the evaluation of proposals is the function of the procuring agency. *The Jonathan Corporation, supra.* We therefore will not question an agency's technical evaluation unless the protester shows the agency's judgment lacked a reasonable basis or the agency otherwise violated procurement statutes or regulations, *Science Information Services, Inc.,* B-207149.2, November 29, 1982, 82-2 CPD 477, including the requirement that the actual evaluation comport with the evaluation criteria established in the RFP. *See Telecommunications Management Corp., supra.* We apply the same standard to a review of the agency's determination whether an initial proposal is in the competitive range, and thus eligible for revisions through discussions. *Spectrum Leasing Corporation,* B-205781, April 26, 1982, 82-1 CPD 383. In this respect, we have recognized that contracting officials have considerable discretion particularly with respect to technical considerations. *Id.*

Applying these principles, we believe the Air Force's methodology—giving no points only where proposed personnel fail to meet the RFP's minimum requirements for their labor category—was re-

sonable, and did not conflict with the stated evaluation scheme. We therefore lack any basis for objecting to it.

Concerning SETAC's argument that Frontier Engineering's initial proposal should have been rejected without discussions, it is improper in a negotiated procurement to exclude an offeror from the competitive range solely on the basis of technical considerations unless its proposal is technically unacceptable. Exclusion from the competitive range is not justified merely because a proposal is technically inferior. *Simpson, Gumpertz & Heger, Inc.*, B-202132, December 15, 1981, 81-2 CPD 467. In deciding whether to exclude a proposal from the competitive range without discussions, the agency should consider the following factors:

(1) how definitively the RFP called for the detailed information, the omission of which was relied on by the agency for excluding a proposal from the competitive range, (2) the nature of the deficiencies, that is, whether they tended to show that the offeror did not understand what it was required to do under the contract, or whether they merely made the proposal inferior but not unacceptable, (3) whether deficiencies were so extensive that the offeror essentially would have to rewrite its proposal to correct them, (4) whether only one offeror was found to be in the competitive range, and (5) whether the deficient proposal represented a significant cost saving. *See Spectrum Leasing Corporation, supra.*

We believe the agency reasonably determined that the deficiencies noted by the evaluators made the proposal inferior—causing point deductions which were taken—but not unacceptable, especially since the agency found the nature of the deficiencies to be minor, the rejection of Frontier Engineering's proposal would have resulted in a competitive range of one, and the proposal offered a cost saving.

With respect to the RFP's requirement that the contractor have an office in Corona and the Washington, D.C. area, nothing in the RFP required the offeror to have such offices prior to award, and the agency only could evaluate the protester's ability to meet the requirement at that time. Therefore, Frontier Engineering's failure to have such offices or to list them in the proposal was not a basis for rejection of its offer. In any event, the initial offer did propose an office in the Washington, D.C. area that Frontier Engineering could occupy if awarded the contract, and the best and final offer identified an office in Corona.

The real thrust of the protester's complaints regarding the fairness and reasonableness of the evaluation is that Frontier Engineering should not have received as high a point score as it did, because it allegedly misrepresented its qualifications and because of the deficiencies noted by the evaluators. As we explained in subsection A, if Frontier Engineering expropriated SETAC's proprietary data and used it to bolster Frontier Engineering's qualifica-

tions for this contract, that does not provide a basis for our objecting to an otherwise valid award. Regarding the deficiencies noted by the evaluators, the protester has not shown that the evaluators unfairly or unreasonably evaluated the offerors' proposals, but basically disagrees with the evaluators' judgment as to the extent Frontier Engineering's proposal should have been downgraded for the deficiencies. The protester's mere disagreement with the agency's judgment does not meet the protester's burden of showing that the evaluation was unreasonable. *Spectrum Leasing Corporation, supra.* Moreover, we point out that even if the point differential between SETAC's and Frontier Engineering's technical scores had been somewhat greater, it would not have precluded the Navy from reasonably determining their technical merits as being essentially equal. *See Lockheed Corporation, supra.*

We therefore deny the protest regarding the propriety of the technical evaluation.

E. *Reasonableness of the Cost Realism Analysis.*

Finally, SETAC questions the Navy's analysis of the realism of Frontier Engineering's proposed costs. SETAC complains that the Navy failed to consider the cost of learning and start-up problems anticipated by the technical evaluators, and suggests that Frontier Engineering's proposed costs were unreasonable. SETAC also alleges that Frontier Engineering is "buying-in," which in this case presumably means the firm has submitted unrealistically low cost data for evaluation purposes while anticipating that it will incur greater costs under this cost-plus-fixed-fee contract.

The Navy's cost analysis primarily involved a review of the reasonableness of the offerors' proposed labor rates and other costs. The offerors did not have to propose a level of effort since the solicitation provided estimated level of efforts (in terms of labor hours) for each labor category. The Defense Contract Audit Agency and the negotiator reviewed the offerors' proposed labor and overhead rates and determined Frontier Engineering's rates to be reasonable in every respect. While Frontier Engineering did reduce its proposed rates for four labor categories in its best and final offer, a Navy negotiation summary relates that the firm based the revised rates on discussions with the Defense Contract Audit Agency auditor regarding minimum acceptable increases in current actual rates. The Navy's negotiator found the best and final offer's rates and proposed fee reasonable.

We have consistently held that a contracting agency's analysis of competing cost proposals involves the exercise of informed judgment, and we therefore will not disturb a cost realism determination unless it lacks a reasonable basis. *Prospective Computer Analysts,* B-203095, September 20, 1982, 82-2 CPD 234. The agency is not necessarily required to conduct an in-depth cost analysis or verify each and every cost item of the offeror's cost proposal. *Hager, Sharp & Abramson, Inc.,* B-201368, May 8, 1981, 81-1 CPD

365. We have also indicated that where the agency has reviewed the offeror's proposed costs against a Defense Contract Audit Agency audit report, as well as against its own estimate of the previous contract's actual costs, we will find the cost analysis technique a reasonable exercise of the agency's discretion. *See JVAN, Inc.,* B-202357, August 28, 1981, 81-2 CPD 184. Since the Navy independently reviewed the cost realism of offers against the Defense Contract Audit Agency's report, based in part on the actual costs of the prior contract, we believe the Navy's technique here is not legally objectionable. *See Southern California Ocean Studies Consortium,* 56 Comp. Gen. 725 (1977), 77-1 CPD 440.

The protester's allegation that the cost analysis failed to take into account certain deficiencies noted by the technical evaluators—the anticipated costs of learning and start-up problems—ignores the fact that the Navy considered these deficiencies to be technical deficiencies which were taken into account in the technical evaluation, resulting in an appropriate loss of points. Since such costs may be speculative and difficult to estimate, reflecting more of a technical deficiency than a quantifiable cost factor, we believe the agency's approach was reasonable.

Except for making a vague suggestion that Frontier Engineering's costs were unreasonably low, the protester has failed to submit any other evidence that the Navy's determination otherwise was unreasonable. SETAC thus has failed to meet its burden of affirmatively proving its case. *See Medical Services Consultants, Inc.; MSH Development Services, Inc.,* B-203998, B-204115, May 25, 1982, 82-1 CPD 493.

We therefore deny the protester's arguments that the Navy failed to perform an adequate analysis of Frontier Engineering's proposed costs' realism.

The protest is dismissed in part and denied in part.

[B-209327]

Leaves of Absence—Compensatory Time—Aggregate Salary Limitation

Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. 5550a, despite fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for Federal employees to earn and use compensatory time for religious purposes. Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute.

Matter of: General Services Administration—Statutory Pay Ceiling—Compensatory Time Off for Religious Observances, July 26, 1983:

The issue presented is whether certain Government employees whose pay has reached the aggregate pay limitation imposed by 5 U.S.C. § 5547, may be granted compensatory time off for religious observances, despite the fact that they are not otherwise entitled to receive premium pay. We hold that agencies may allow all of their employees, including those employees whose salaries have reached the aggregate pay limitation, to work hours in excess of the basic 40-hour workweek in order to compensate for time used when those employees remain absent from work in fufillment of their religious obligations.

This decision is in response to a letter from Ms. Allie B. Latimer, General Counsel of the General Service Administration (GSA), requesting that we review section 5550a of Title 5, United States Code, to determine whether agencies properly may grant compensatory time off for religious observances to members of the Senior Executive Service (SES) and to General Schedule (GS) and Merit Pay (GM) employees who have reached the aggregate pay limitation or pay cap imposed by 5 U.S.C. § 5547. The General Services Administration brought this matter to our attention, "because of conflicting statutory and regulatory provisions and previous Comptroller General decisions which disallowed the earning and use of compensatory time" by such employees.

Specifically, GSA believes that as applied to Government employees at the statutory pay cap, Title IV of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, Public Law 95-390, September 29, 1978, 92 Stat. 755, 762, which authorized the granting of compensatory time off to employees for religious observances, may be inconsistent with certain provisions of the Civil Service Reform Act of 1978, Public Law 95-454, October 13, 1978, 92 Stat. 1111, which provide that members of the Senior Executive Service (SES) are to be excluded from receiving any form of premium pay under 5 U.S.C. Chapter 55, subchapter V. In its submission, the agency states as follows:

> * * * It is our interpretation based upon the specific exclusion of SES members from coverage under this subchapter, that they were not eligible to use the provisions of section 5550(a) for compensatory time off for religious observances. In addition, we believe that employees at or above the statutory pay cap of $57,500 for GS and GM employees and $58,500 for SES members should be excluded based on the rule established in 37 Comptroller General (CG) 362 and further amplified in CG Decision B-200058, dated January 28, 1981.

In essence, the agency questions how Federal employees who have reached the statutory pay cap may be authorized to earn and use compensatory time off for religious observances, since we have previously held that compensatory time which may be granted to employees in lieu of monetary compensation for irregular or occasion-

al overtime work is subject to the aggregate salary limitations set in 5 U.S.C. § 5547.

According to the submission, the Office of Personnel Management (OPM) has informally advised GSA that employees who are now being paid at the statutory maximum are entitled to earn and use compensatory time off for religious observances, since, in OPM's view, Congress did not intend to exclude such capped employees from the coverage of 5 U.S.C. § 5550a. The GSA now questions OPM's interpretation of Congress' intent in this matter. The agency notes that while the language of 5 U.S.C. § 5550a does not indicate any intention on the part of the Congress to specifically exclude any group of employees from entitlement to compensatory time off for religious observances, neither does it show a clear intent to include employees at the statutory pay cap, who are otherwise not entitled to earn and use compensatory time in lieu of overtime pay. Furthermore, GSA points to language in the Civil Service Reform Act of 1978 which specifically excludes members of the SES from receiving any form of premium pay. The agency maintains that since the Civil Service Reform Act of 1978 (which was enacted after the passage of Public Law 95-390) made no reference to use of compensatory time for religious observances by capped SES employees, it is doubtful that Congress intended for such employees to be able to earn and use compensatory time for religious purposes, as an exception to the general rule allowing no premium pay.

Title IV of the Federal Employees Flexible and Compressed Work Schedules Act of 1978 added section 5550a to Title 5 of the United States Code, authorizing Government agencies to grant compensatory time off for their employees' religious observances. That section provides in part as follows:

> (a) * * * the Office of Personnel Management shall prescribe regulations providing for work schedules under which an employee whose personal religious beliefs require the abstention from work during certain periods of time, may elect to engage in overtime work for time lost for meeting those religious requirements. Any employee who so elects such overtime work shall be granted equal compensatory time off from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons, *notwithstanding any other provision of law.* [Italic supplied.]

In accordance with the above statute, on October 6, 1978, the Office of Personnel Management (OPM) promulgated regulations to implement 5 U.S.C. § 5550a. Those regulations, which are contained in 5 C.F.R. Part 550, Subpart J, are said to apply to "each employee in or under an executive agency as defined by section 105 of title 5, United States Code." Section 105, in turn, defines an executive agency as "an Executive department, a Government corporation, and an independent establishment."

Subpart J specifically provides as follows, at section 550.1002:

> (b) To the extent that such modifications in work schedules do not interfere with the efficient accomplishment of an agency's mission, the agency shall in each instance afford the employee the opportunity to work compensatory overtime and shall in each instance grant compensatory time off to an employee requesting such

time off for religious observances when the employee's personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

* * * * * * *

(d) The premium pay provisions for overtime work in Subpart A of Part 550 of Title 5, Code of Federal Regulations, and section 7 of the Fair Labor Standards Act of 1938, as amended, do not apply to compensatory overtime work performed by an employee for this purpose.

We believe that the language and the legislative history of section 5550a show an intent on the part of Congress to provide all Federal employees, including those at the statutory pay cap, with the opportunity to earn and use compensatory time off for religious observances. The language of the statute itself is rather compelling in this regard, since it appears to embrace *any employee* who elects to work overtime hours to compensate for time lost in meeting his religious requirements, notwithstanding any other provision of law. Furthermore, the regulations implementing the statute specifically provide that 5 U.S.C. § 5550a is to be applied to each employee of an executive department, Government corporation, or independent establishment, as defined by 5 U.S.C. § 105, above. Like the statute itself, these regulations appear broad in coverage. Subpart J directs agencies to *in each instance* afford an employee the opportunity to work compensatory overtime when the employee's personal religious beliefs require his abstention from work. In addition, the above statute and its implementing regulations provide only one specific limitation on Federal employees' entitlement to compensatory time off for religious purposes. That restriction states that an employee's request for religious compensatory time may properly be denied under "such exceptions as may be necessary to efficiently carry out the mission of the agency or agencies involved." 5 U.S.C. § 5550a(c). In no place, however, do the statute or regulations state that compensatory time off for religious purposes is not to be granted to employees who are otherwise not entitled to accrue and use compensatory time off under the premium pay provisions of subchapter V of Chapter 55, Title 5, United States Code.

In this regard, the regulations at Subpart J, which were promulgated to implement section 5550a, specifically provide that the premium pay provisions contained in Subpart A of 5 C.F.R. Part 550, which implement 5 U.S.C. Chapter 55, subchapter V, above, do not apply to compensatory time off for religious purposes under that title. Thus, OPM is clearly treating compensatory time off for religious observances as a different kind of entitlement than compensatory time off which may be afforded to an employee for irregular or occasional overtime work in lieu of monetary compensation under 5 U.S.C. § 5543. We believe that the legislative history and the unique subject matter of section 5550a support such a determination.

Section 5550a is specifically concerned with the amount of freedom enjoyed by Federal employees in exercising their religious be-

liefs. The free exercise of such beliefs is a fundamental right guaranteed under the First Amendment of the United States Constitution. An individual's freedom both to hold a particular set of religious beliefs and to practice in accordance with those beliefs has traditionally been one of the highest values of our society. See *Marsh* v. *Alabama,* 326 U.S. 501 (1946); and *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). Therefore, as the United States Supreme Court stated in *Braunfeld* v. *Brown,* 366 U.S. 599, 606 (1961), "when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it."

The legislative history of section 5550a shows that the provision was intended to cover all employees. In introducing this section on the House floor as an amendment to the Flexitime Act, Representative Solarz, the sponsor of section 5550a, stated that the section "is designed to guarantee that all Federal employees are treated equally, regardless of their religion, and to make sure that no Federal employee is discriminatorily or unnecessarily penalized because of their devotion to their faith." 124 Cong. Rec. 15435 (1978). Representative Solarz also stated that employees who elected to work overtime to make up for time lost for religious observances would "waive their right to premium overtime pay rates for such work and are only to be granted equal compensatory time off from their schedules (sic) tours of duty." *Id.* at 15435–15436. Finally, Representative Solarz stated that:

> * * * The sole purpose of this legislation is to require the Federal Government, as an employer, to make reasonable accommodation to the religious needs of its employees who, because of their religious faith, are unable to work during certain periods of the normal workday or workweek. *Id.* at 15436.

The emphasis of Title IV, thus, is clearly to provide for flexibility in Federal personnel practices, in order to permit all Federal employees to exercise the tenets of their faiths without being forced to lose a portion of their pay or annual leave.

This legislative history of section 5550a does not specifically address the use of religious compensatory time by employees who are at the statutory pay cap and are, thus, not entitled to receive compensatory time off in lieu of overtime pay under 5 U.S.C. § 5543. However, we believe that section 5550a was enacted to provide a mechanism whereby all individuals, especially those of minority faiths, would be able to exercise their beliefs without losing pay or annual leave under the Federal personnel system. The goal of the statute was to encourage the free exercise of religious beliefs by Government employees, and the accrual and use of compensatory time off was simply a means to achieve that goal. In light of this purpose, we do not believe that Congress intended to exclude any group of employees, including those at the statutory pay cap, from exercising their entitlement to religious compensatory time under 5 U.S.C. § 5550a.

To the contrary, the specific goal of 5 U.S.C. § 5543 is simply to provide a mechanism whereby Federal employees may request compensatory time off in lieu of monetary compensation for actual overtime work performed. Under subchapter V of Chapter 55, Title 5 of the United States Code, an employee may receive such compensatory time off for overtime work he has performed, *for which he would otherwise be entitled to receive premium pay.* This is in marked contrast to compensatory time off for religious purposes, which does not contemplate or in any way involve the payment of premium pay for any work performed in excess of an 8-hour workday or a 40-hour workweek. Thus, an employee who earns a given amount of compensatory time for religious observances may not elect to be paid for that time. Rather, section 5550a merely allows an employee to work in excess of the basic 40-hour workweek, and thereby earn, and have credited to a special leave account, a given number of hours, which he may use in place of time lost to fulfillment of his religious obligations. Thus, the earning and use of compensatory time off for religious purposes, in essence, involves a mere substitution of time and, unlike traditional compensatory time off granted under 5 U.S.C. § 5543, cannot replace, or result in, an employee's entitlement to premium compensation.

The GSA has correctly stated that under our decisions in 37 Comp. Gen. 362 (1957), and *Donald Bodine,* 60 Comp. Gen. 198 (1981), compensatory time off which may be granted to employees in lieu of monetary compensation for irregular or occasional overtime work is subject to the aggregate salary limitation imposed on employees by statute. Under these decisions, an employee whose pay is set at the statutory ceiling for his position is not entitled to receive either additional compensation (premium pay) for his overtime work or compensatory time off in lieu of such compensation. See also *Earl S. Barbely,* B-192839, May 3, 1979.

In light of the distinctions we have drawn above between traditional compensatory time off in lieu of premium pay and compensatory time off for religious observances, we do not believe that the latter should be treated as normal premium pay, which is subject to the aggregate salary limitation, under the provisions of subchapter V of Chapter 55, Title 5, United States Code. Rather, we believe that in enacting section 5550a, Congress intended to provide a means whereby all employees could worship more freely, without losing their pay or accumulated leave. Thus, in authorizing the accrual and use of compensatory time for religious purposes, 5 U.S.C. § 5550a grants employees flexibility in exercising their beliefs, rather than any form of premium pay.

Accordingly, since religious compensatory time is not premium pay which is subject to limitation by statute, Federal agencies may allow all of their employees, including those whose pay has reached the statutory limit, to work overtime hours under 5 U.S.C. § 5550a,

to compensate for time lost when they must abstain from working in fulfillment of their religious obligations.

[B-209965]

Payments—Voluntary—No Basis for Valid Claim—Exception—Supervisory, etc. Direction

Claim for reimbursement of personal funds used to pay for repair of telephone answering system may be paid. Since the procurement of the repair services was authorized by superiors it would be unfair for the Government to retain the advantages of the services without repaying claimant. 62 Comp. Gen. 419 (B-206236, June 1, 1983) is distinguished.

Matter of: Sadie G. Crawford, July 26, 1983:

The Accounting and Finance Officer, Defense Logistics Agency (DLA), Department of Defense, has requested an advance decision on whether he may certify for payment the claim of Sadie G. Crawford, Supply Management Representative, Wright-Patterson AFB, Ohio. The claim represents a $69.24 payment by Ms. Crawford from her personal funds for repair of a telephone answering system that she used in her assignment. The claim may be paid for the reasons given below.

The DLA telephone answering system in question, although new, was out of warranty and inoperable. Claimant requested and received authority from the DLA Operations Office to have the system repaired. This authority did not give her authority to enter into a contract, however, according to the submissions to this Office. It appears that the claimant, a new employee, was not advised that all charges were to be submitted through channels and consequently paid for the repairs out of her personal funds.

In our recent decision 62 Comp. Gen. 419, B-206236, June 1, 1983, we said that where a Government employee uses personal funds to procure goods or services for official use he or she may be reimbursed if the underlying expenditure itself is authorized, failure to act would have resulted in disruption of the relevant program or activity and therefore satisfies the test of "public necessity," and the transaction satisfies criteria for either ratification of the procurement or *quantum meruit* if the contractor had not yet been paid by the employee. That case also explained that a lesser standard of public necessity may be applied when the employee was directed to take the action at issue by a superior.

We are not dealing here with a situation covered precisely by B-206236, *supra.* Even though no authorized contracting officer entered into the contract, the employee had obtained approval from the Defense Logistics Agency Directorate of Supply Operations (DLA-O) to secure the repairs prior to obtaining the services. As the transaction is described in a July 8, 1982 DLA memorandum, that office had apparently established a pattern of securing repairs by having employees request services and submit bills for payment

through channels. The bill apparently ordinarily would have been paid on the basis of an "after-the-fact procurement determination." In other words, it would have been routinely ratified. Ms. Crawford's failure in this process was not that she solicited the service without authority, but that she paid for it. Further, there is no indication that the amount paid for the repairs, $69.24, was not reasonable, and the request from DLA recommends payment.

As DLA points out, ratification in the instant case is not authorized because the contractor has already been paid. Moreover, voluntary creditors act at their own risk and do not acquire *legal* claims against the Government. Nevertheless, this situation fits comfortably within the criteria set forth in B-206236, *supra,* for *equitable* relief for the employee. As mentioned above, there is little doubt that DLA could and would have ratified the transaction had Ms. Crawford not made the payment prematurely. In such circumstances, we hold that Ms. Crawford may be reimbursed the amount she mistakenly paid the repairman.

[B-211638]

Travel Expenses—Overseas Employees—Renewal Agreement Travel—Constructive Travel Costs—Computation

Special air fares should be used to compute constructive travel expenses to an employee's residence as the maximum entitlement to tour renewal travel to an alternate location, provided the agency can determine before the travel begins that the discount fare would be practical and economical. Applicability of special fares should be determined on the basis of constructive travel to the actual place of residence, using the scheduled dates of departure and return, even though the travel is to an alternate location.

Matter of: Tour renewal agreement travel, July 26, 1983:

When an employee and his family perform tour renewal agreement travel to a place other than their place of actual residence, allowable travel costs may not exceed the constructive cost of travel to the residence. The Administrator of the Panama Canal Commission asks whether a special or discount air fare, rather than the regular coach fare, should be used in computing that constructive cost. We hold that the computation should be based on the lower fare if it can be determined in advance of the travel that the employee would qualify for such fare to and from the place of actual residence based on the scheduled dates of departure from and return to post.

The tour renewal travel provisions originally enacted as Public Law 737, approved August 31, 1954, 68 Stat. 1008, are intended to provide expenses of round-trip travel and transportation for civilian Government employees and their families between tours of duty overseas for the purpose of taking leave. *Matter of Hendricks,* B-205137, May 18, 1982. Now codified at 5 U.S.C. § 5728, the law states that agencies, pursuant to regulations prescribed by the President, shall pay for such travel from the employee's "post of

duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty * * *."

The applicable regulations in paragraph 2-1.5h(2)(c) of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR) provide for travel to an alternate location other than the actual residence at the time of assignment to a post of duty outside the conterminous (continental) United States. The alternate location must be in the same country as the residence. Under this paragraph the expenses paid by the Government to the alternate location:

> * * * [s]hall not exceed the amount which would have been allowed for travel over a usually traveled route from the post of duty to the place of actual residence and for return to the same or a different post of duty outside the conterminous United States as the case may be.

Under this regulation the employee is entitled to the constructive cost of round-trip travel to and from the actual place of residence or the amount the employee spends for travel to the alternate location, whichever is less. *Matter of Willis,* B-192619, July 23, 1979.

The Administrator asks whether the constructive cost of round-trip travel to the employee's actual place of residence may be determined on the basis of the regular coach air fare or whether it must be determined on the basis of "special fares" that are the subject of FTR para. 1-3.4. Under that regulation "Through fares, special fares, commutation fares, excursion, and reduced-rate round trip fares" are to be used if it can be determined before the start of a trip that this type of service is practical and economical to the Government (FTR para. 1-3.4b(1)(a)). Generally the lowest-cost service is to be used when different fares are charged for the same type of accommodations between the same points, unless the higher cost is administratively determined to be more advantageous to the Government (FTR para. 1-3.4c).

In urging that an employee's reimbursement for renewal agreement travel to an alternate location should be based on the regular coach fare to the actual place of residence, the Administrator suggests that other provisions of the FTR authorize reimbursement on a constructive cost basis without regard to the availability of special fares. He refers to FTR para. 1-3.3d(2)(c), which requires the traveler to pay the difference between first class and the "next lower class" when he upgrades his air accommodations to first class for his personal convenience. The other provision to which the Administrator refers is FTR para. 1-4.3a(1), which provides that an employee who travels by privately owned vehicle as a matter of personal preference may be paid mileage limited to the "constructive cost of coach accommodations (or tourist or economy accommodations if a carrier uses this term instead of coach accommodations)." It should be noted that these two regulations are addressed to the class of accommodations that will be used as a basis for comparison and not to the fare. Under FTR para. 1-4.3a(1) we have held that the mileage allowance payable to an employee who travels by privately owned vehicle as a matter of personal prefer-

ence is limited to a special discount fare when the employee, in accordance with FTR para. 1–3.4b, was instructed to use that reduced fare for the travel to be performed. *Matter of Porcella,* B–191586, February 25, 1981.

In fact, we recognized in 39 Comp. Gen. 676 (1960) that reduced fares for direct travel to and from the place of actual residence should be used in determining the constructive cost limitation applicable to reimbursement for renewal agreement travel to an alternate location. Under the regulations then in effect employees were authorized to use first class accommodations for air travel unless the travel orders specified air coach or air tourist accommodations. (Paragraph 3.6c of Bureau of the Budget Circular No. A–7, August 1, 1956.) As they do today, the regulations then in effect required the use of special fares when it could be determined in advance that such service was practical and economical. (Circular No. A–7, paragraph 3.9.) Consistent with these two regulations, we held that the constructive cost of travel to the place of actual residence should be based on the lowest first class rate, including a family plan rate if applicable, when travel is performed by mode of travel other than authorized and when travel is to a place other than the place of actual residence.

We are unpersuaded by the Administrator's argument that reimbursement should not be limited on the basis of special fares and that the above-cited decisions are inapplicable because the Panama Canal Commission has not issued instructions requiring its employees to use discount fares and because its travel personnel "tend not to distinguish between types of fares and classes of accommodations." In a memorandum entitled *Savings Available By Using Airline Discount Fares* addressed to heads of departments and agencies (B–103315, August 25, 1977), we noted that the FTR directs the use of discount fares and stressed the need for agencies to increase the use of such fares. To comply with FTR para. 1–3.4 and that memorandum the Panama Canal Commission should determine in advance of renewal agreement travel whether discount air fares are available to and from the actual place of residence and make an appropriate notation to that effect on the employee's travel order. Where the availability of a specific discount fare depends on the dates of travel, its applicability should be determined on the basis of a constructive itinerary using the scheduled dates of departure from and return to post, even though travel is actually performed to an alternate location. See 39 Comp. Gen. 676, *supra,* and B–166552, June 27, 1969.

In so holding we have considered the Administrator's argument that the availability of a discount air fare to the employee's actual residence may limit his selection of an alternate destination. He points out that employees whose residences are about the same distance from Panama may have different dollar limitations on their tour renewal agreement travel depending on the availability of discounts to their respective cities. Paragraph 2–1.5h(2) (c) of the FTR necessarily gives rise to differing cost limitations as between em-

ployees and may require some to pay a portion of the cost to an alternate location while others may incur no cost for travel to the same destination. This differential is inherent in any arrangement basing the maximum expense payable on the constructive cost of travel to a given location, in this case the actual residence, but allowing the employee the choice of traveling elsewhere. Where travel to the actual place of residence can be performed within the constructive cost limitations it is immaterial whether the differences in costs incurred by employees for travel to alternate locations result from differing distances between two locations or the airlines' discount fare structure.

[B-210086]

Federal Claims Collection Act of 1966—Procedure—Standards—Applicability—Social Security Act

Social Security Administration is not bound by Federal Claims Collections Standards (FCCS) requiring administrative offset "in every instance in which this is feasible," in light of section 8(e) of the Debt Collection Act of 1982, 31 U.S.C. 3701(d). The FCCS, 4 C.F.R. Chapter II, to the extent they implement the 1982 legislation, do not govern the use of administrative offset to collect debts arising under the Social Security Act. However, Social Security Administration may continue to use administrative offset to collect such debts when authorized by other statutes or principles of common law, and should look to FCCS for guidance to the extent it has not issued its own offset regulations.

Federal Claims Collection Act of 1966—Procedure—Standards—Agency Implementation—Administrative Offset

Whether collection by administrative offset under the Federal Claims Collection Standards, 4 C.F.R. Chapter II, is "feasible" lies within the agency's exercise of sound discretion, on a case-by-case basis. The term is not synonymous with "possible." Agencies should consider not only whether administrative offset can be accomplished, both practically and legally, but also whether it is best suited to further and protect the Government's interests. In certain circumstances, agencies may give due consideration to the debtor's financial condition, and are not required to use offset in every instance in which there is an available source of funds, for example, where those funds are payments under a benefit program designed to avoid or alleviate financial hardship.

Federal Claims Collection Act of 1966—Compromise, Waiver, etc. of Claims—Authority—Consideration of Debtor's Financial Condition

Under the Federal Claims Collection Standards, 4 C.F.R. Chapter II, when determining whether to compromise claims, or suspend or terminate collection activity, agencies should exercise sound discretion, and may consider, among other factors, the financial condition of the debtor. The fact that the debtor is receiving Government benefits is merely one more factor to be considered when determining whether compromise, suspension, or termination (or some other action) best serves and protects all of the Government's interests.

Matter of: Social Security Administration—Debt Collection, July 28, 1983:

The Associate Commissioner for Management, Budget and Personnel, Social Security Administration (SSA), Department of Health and Human Services, has requested an interpretation of those provisions of the Federal Claims Collection Standards (FCCS),

4 C.F.R. Parts 101–105, which relate to the suspension or termination of collection action on claims arising under the Social Security Act. The specific question presented is whether suspension or termination is authorized where an individual is in "current benefit status," regardless of the hardships created by making deductions from his benefits. The issue arises because section 102.3 of the FCCS requires collections by administrative offset in every instance in which this is feasible. For the reasons discussed below, we think SSA does have that authority, because SSA is not subject to the adminstrative offset section of the FCCS.

BACKGROUND

SSA recently published proposed amendments to its regulations implementing its statutory authority (*e.g.*, 42 U.S.C. § 404(b)) to waive the recovery of overpayments. 48 Fed. Reg. 6354, February 11, 1983. The proposed regulations, which would amend 20 C.F.R. Parts 404, 410, and 416, would impose a 60-day time limit on requesting waiver. Untimely requests would be considered only upon a showing of good cause for the lateness. According to SSA's Supplementary Information statement:

> In the event that the individual does not request waiver timely or a timely waiver request is denied, the individual will no longer be entitled to relief pursuant to the waiver provisions. If his or her financial situation changes for the worse, relief from repayment may be considered under the general rules regarding collection of Federal debts (Federal Claims Collection Standards), through suspension or termination of collection activity, reduction of the rate of recovery, or by compromise of the amount to be repaid. 48 Fed. Reg. 6355.

The above passage reflects the approach the SSA Debt Management Staff would like to follow. The Debt Management Staff believes that "temporary suspension or termination of collection activity would be possible under the FCCS so long as the rights and interests of the Government are protected, even if the individual is currently receiving benefits."

However, internal SSA deliberations in connection with the proposed waiver regulations have generated some doubt as to whether the FCCS permit the approach desired. The doubt stems from two factors. First, 4 C.F.R. § 102.3 provides that "collections by offset will be undertaken administratively * * * on claims which are liquidated or certain in amount in every instance in which this is feasible." If "feasible" is construed as "possible," then offset is arguably required whenever there is a source of funds available, and this will always be the case when the debtor is in current payment status under a benefit program, regardless of the debtor's financial condition. Second, it is possible to read the regulations as precluding suspension or termination of collection action based on financial "hardship," and as precluding even the consideration of suspension or termination if there is an available source of funds for offset. Although this portion of the FCCS does not apply to SSA debts, this decision will attempt to clarify these issues as guidance to SSA in developing its own regulations.

CLAIMS COLLECTION LEGISLATION AND REGULATIONS

The first attempt to legislatively establish a Government-wide debt collection program was the Federal Claims Collection Act of 1966, now codified at 31 U.S.C. § 3711. The 1966 legislation (1) directed Federal agencies to pursue the collection of debts owed or referred to them (2) authorized compromise, suspension, and termination within limits, and (3) authorized the General Accounting Office and the Department of Justice to jointly issue implementing regulations. The joint regulations (FCCS) are found at 4 C.F.R. Parts 101–105.

In October 1982, Congress enacted the Debt Collection Act of 1982 (Pub. L. No. 97–365, 96 Stat. 1749) to give the Government increased authority in the debt collection area and to ensure basic due process protections for debtors. However, by virtue of section 8(e) of the 1982 Act, codified at 31 U.S.C. § 3701(d) (Pub. L. No. 97–452, January 12, 1983, 96 Stat. 2467, 2470), the authorities newly granted by the Debt Collection Act of 1982, with a few exceptions, do not apply to claims arising under or amounts payable under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States.

The 1982 Act necessitated substantial amendments to the FCCS. The proposed revision to the FCCS was published for comment on May 24, 1983 (48 Fed. Reg. 23249). In view of 31 U.S.C. § 3701(d), *supra,* some portions of the FCCS will apply to debts arising under the Social Security Act, while others will not. See proposed 4 C.F.R. § 102.19, 48 Fed. Reg. 23254. (The proposed regulations are, of course, subject to change upon being issued as final regulations.) References to the FCCS will be to the 1982 edition, unless otherwise specified.

ADMINISTRATIVE OFFSET

It has long been the Government's position, even prior to any of the debt collection legislation, that except for offset against the salary of Government employees and certain other exceptions not relevant to this discussion, the common law right of offset available to a private creditor applied equally to the Government. *E.g., United States* v. *Munsey Trust Co.,* 332 U.S. 234, 240 (1947); 1 Comp. Gen. 605 (1922); 3 *id.* 1006 (1924). In apparent recognition of this, the Federal Claims Collection Act of 1966 did not mention offset. The FCCS, statutory regulations under the 1966 legislation, included administrative offset as a key element of the Government's debt collection program. Thus, 4 C.F.R. § 102.3(a), noted previously, directed agencies to use offset whenever "feasible."

The Debt Collection Act of 1982 includes a provision, section 10, codified at 31 U.S.C. § 3716, dealing with administrative offset. Section 10, however, does not apply to claims arising under the Social Security Act. 31 U.S.C. § 3701(d), *supra.* This does not mean that SSA lacks offset authority. We view section 10 as not creating new

authority but as merely adding certain requirements and safeguards to authority that already existed. See B-209669, December 17, 1982 (letter to Justice Department). Also, section 10 (and therefore the FCCS to the extent they implement section 10) would not apply to SSA when acting under its common law authority or its separate statutory offset authority such as 42 U.S.C. § 404(a). See 31 U.S.C. § 3716(c)(2). Thus, 31 U.S.C. § 3716 and the FCCS do not govern the use of administrative offset to collect debts arising under the Social Security Act,[1] and SSA is free to develop its own regulations dealing with administrative offset.

Nevertheless, the FCCS are of some relevance and SSA should look to them for guidance to the extent it has not developed its own offset regulations. 4 C.F.R. § 101.4. *See* 62 Comp. Gen. 489 (B-210998, June 22, 1983). Therefore, while the directive to use administrative offset "whenever feasible," retained in the proposed FCCS revision, no longer applies to debts arising under the Social Security Act, a brief discussion of our approach under that provision may be useful.

In our opinion, the term "feasible," as used in 4 C.F.R. § 102.3, should not be construed as synonymous with "possible." We have held that the determination of whether collection by offset is "feasible" lies within the agency's exercise of sound discretion. B-167635, November 18, 1975. When determining whether setoff is feasible, agencies should consider not only whether offset can be accomplished, both practically and legally, but also whether it is best suited to further and protect the Government's interests. *Id.*

In making this determination, we think it is legitimate for the agency to take the debtor's financial condition into consideration, especially where the debtor is a beneficiary of a Government program designed to avoid or alleviate financial hardship and there is no indication of fraud or willful misconduct. We do not believe that agencies are required to use administrative offset against Government beneficiaries if to do so would tend to substantially interfere with or defeat the purposes of the applicable benefit program. *Cf.,* B-209669, December 17, 1982; B-171019, December 14, 1976; B-182423, November 25, 1974. *See also, Bell v. New Jersey,* No. 81-2125, slip op. at 9 n.8 (U.S. May 31, 1983). Normally, agencies should determine whether adminstrative offset is feasible and in the Government's best interests on a case-by-case basis. Moreover, agencies should also exercise some degree of reasonable discretion in setting the amount and duration of the deductions to be made, if and when it is determined by the agency that offset should be effected. *Cf.,* 43 Comp. Gen. 524 (1964); 34 *id.* 504, 509 (1954).

SUSPENSION, COMPROMISE, AND TERMINATION

The preceding discussion of the offset requirement is important because if offset were required whenever "possible," there would never be an occasion to consider suspension, compromise, or termi-

[1] One provision of the proposed administrative offset regulations, 4 C.F.R. § 102.3(e), 48 Fed. Reg. 23252, dealing with offset against judgments, will remain applicable because it is based on independent statutory authority.

nation when the debtor is in current payment status under an SSA benefit program.

In contrast with administrative offset, SSA's authority to compromise, or to suspend or terminate collection action on debt claims derives from the Federal Claims Collection Act of 1966 and is not affected by the Debt Collection Act of 1982. Therefore, the FCCS, as they relate to these three items, will continue to apply to Social Security Act debts. SSA recognizes this, as evidenced by the Supplementary Information statement to its proposed waiver regulations, quoted earlier in this decision.

A major area of concern to SSA is its authority to temporarily suspend collection action or enter into repayment agreements which provide for deferred payment by resort to mutually agreeable periods of little or even no payment, followed by the initiation and completion of repayment in more substantial installment or lump-sum amounts. Such suspensions and repayment agreements would be undertaken based upon a reasonable expectation in the particular case that the financial condition of the indebted beneficiary will significantly improve in the not-too-distant future.

In our opinion, the FCCS do not preclude the suspension of collection activity based on the temporary financial condition of the debtor. The FCCS provide that "[c]ollection action may be suspended temporarily on a claim when the debtor owns no substantial equity in realty and is unable to make payments on the Government's claim or effect compromise thereof at the time, but his future prospects justify retention of the claim for periodic review and action * * *." 4 C.F.R. § 104.2. In our view, this section authorizes agencies to temporarily suspend collection activity due to the hardship condition of the debtor, in conjunction with the reasonable anticipation that the debtor's financial condition will improve in the not-too-distant future. This could be authorized even though the debtor is currently receiving Government benefits. Moreover, the FCCS also authorize agencies to enter into deferred payment agreements with debtors. Section 102.10 of the FCCS specifically provides that "[t]he size and frequency of such installment payments should bear a reasonable relationship to the size of the debt and the debtor's ability to pay." Cf. 34 Comp. Gen. 504, 509 (1955); 43 *id.* 524 (1964). Therefore, repayment agreements like those described above are within the scope of agency discretion as contemplated by the FCCS. The proposed amendments to the FCCS are more specific in this regard. See proposed 4 C.F.R. § 104.2, 48 Fed. Reg. 23255–56.

As is always the case, agencies should adhere to a "rule of reason" when exercising discretion under the FCCS. Whatever action is taken must be calculated to adequately protect the Government's interests. For example, we do not believe that it would be appropriate to enter into a repayment agreement or to temporarily suspend collection if the agency lacked reasonable grounds to

support the expectation that the debtor's financial condition will improve in the not-too-distant future. Nor should such steps be taken in the absence of the debtor's demonstration that immediate repayment, whether voluntary or involuntary, would impose a real and unreasonable hardship.

At the same time, such activity need not be undertaken when compromise under the FCCS seems more appropriate. Just as explained above with regard to suspension and offset, agencies should not automatically assume that compromise may not be predicated upon the debtor's financial condition just because the debtor is receiving Government benefits. Section 103.2 of the FCCS makes it clear that claims may be compromised if the Government cannot collect the full amount of the debt because of "the debtor's inability to pay the full amount within a reasonable time." *See also* 62 Comp. Gen. 489 (B–210998, June 22, 1983). In this regard, that section specifies a variety of economic and non-economic criteria to be considered in determining the debtor's ability to repay the debt. Should the agency conclude that the expectation of improvement in the debtor's financial position is too speculative or too distant in the future to justify a repayment agreement or a temporary suspension of the kind described above, the agency should explore compromise. The fact that the debtor is receiving Government benefits is merely one more factor to be considered, under the criteria given in section 103.2, when determining whether and how much the debtor is reasonably able to repay within a reasonable time, and whether compromise is appropriate in the particular case.

Similarly, although termination of collection action should be viewed as a "last resort," agencies should not construe section 104.3(a) of the FCCS (which states that collection may be terminated when "it becomes clear that the Government cannot collect or enforce collection of any significant sum") to mean that termination is *never* appropriate when the debtor is receiving Government benefits. Agencies should exercise sound discretion to determine both whether and how much each individual debtor is reasonably able to pay, and how much constitutes a "significant sum." Section 104.3 provides a sampling of the criteria to be used in making those determinations. As noted above with regard to both compromise and suspension, the fact that the debtor is receiving Government benefits is merely one more factor to be considered when ascertaining the "debtor's inability to pay," and whether termination best serves and protects all of the Government's interests. 4 C.F.R. § 104.3(a).

In conclusion, for the reasons discussed above, SSA's proposed approach as reflected in the February 11, 1983, Federal Register is not legally objectionable nor inconsistent with the FCCS. We would suggest that SSA closely monitor its experience under the new waiver regulations. If it is determined that a substantial proportion of untimely waiver requests would qualify for waiver but for the lateness, it might then be desirable to re-examine the time limit.

[B-211381]

Compensation—Panama Canal Employment System—Retroactive Increases—Authority to Implement

The Assistant Secretary of the Army (Civil Works) questions whether he is authorized by section 1225(b)(2) of the Panama Canal Act of 1979 to retroactively implement an increase in the wages of employees of Federal agencies participating in the Panama Canal Employment System. We hold that the wage increase may not be effected retroactively because section 1225(b)(2) of the Panama Canal Act, authorizing annual wage increases, does not specifically provide for the retroactive implementation of such increases. Absent specific statutory authority, pay increases resulting from the exercise of discretionary administrative authority may be implemented on only a prospective basis.

Matter of: Panama Canal Employment System—Retroactive Wage Increases, August 2, 1983:

William R. Gianelli, Assistant Secretary of the Army (Civil Works), has requested a decision, as to whether the Panama Canal Act of 1979, Public Law 96-70, authorizes him to grant a retroactive increase in wages for certain employees of Federal agencies participating in the Panama Canal Employment System. We hold that the Assistant Secretary is not authorized to grant a retroactive wage increase for the affected employees because section 1225(b)(2) of the Panama Canal Act, 22 U.S. Code 3665, authorizing annual wage increases, does not specifically provide for the retroactive implementation of such increases. Absent a specific statutory provision authorizing retroactive pay adjustments, an increase in compensation resulting from the exercise of discretionary administrative authority may be effected on only a prospective basis.

This decision has been handled as a labor-management relations matter under our procedures in 4 C.F.R. Part 22 (1983). Copies of the request were served upon seven labor organizations, but we received no comments from those groups.

DISCUSSION

Prior to implementation of the Panama Canal Treaty of 1977 (TIAS No. 10030), employees of Federal agencies conducting operations in the Republic of Panama were paid under the Canal Zone Merit System in accordance with rates of basic pay for the same or similar work in the United States. See Canal Zone Code, title 2, §§ 144, 149 (1962). The Panama Canal Act of 1979, Public Law 96-70, chapter 2, 96 Stat. 468, 22 U.S.C. §§ 3601-3871 (Supp. III 1979), implementing the Panama Canal Treaty, directed replacement of the Canal Zone Merit System by the Panama Canal Employment System, and established a new schedule of wages applicable to certain employees hired on or after the effective date of the Act. The new wage schedule, implemented on October 1, 1979, by the Panama Area Wage Base, is prescribed by section 1225(b) (22 U.S.C. § 3665(b)(2) (Supp. III (1979)) of the Act as follows:

(b)(1) Effective October 1, 1979, each individual employed by an Executive agency or the Smithsonian Institution, whose permanent duty station is located within an area or installation in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements, shall be paid basic pay at a rate of not less than $2.90 an hour.

(2) Effective on October 1 of each succeeding calendar year, the rate of basic pay for each individual referred to in paragraph (1) of this subsection whose basic pay is not fixed in relation to rates of basic pay for the same or similar work performed in the United States shall be increased by an amount equal to not less than 2 percent of the rate of basic pay for that individual in effect immediately before that date.

Under the "grandfather" provisions of section 1219 of the Panama Canal Act, individuals employed by Federal agencies operating in the Republic of Panama prior to the effective date of the Act are not subject to the wage schedule established in section 1225(b)(2), but, instead, continue to receive rates of basic pay comparable to United States wage rates. 22 U.S.C. § 3659 (Supp. III 1979).

Authority for administering the wage and employment provisions of the Panama Canal Act is vested in the President by Section 1223(a) of the Act. 22 U.S.C. § 3663 (Supp. III 1979). By Executive Order No. 12173, 44 Fed. Reg. 69271 (1979), as amended, the President delegated his authority under the Act to the Secretary of Defense. Implementing regulations promulgated by the Secretary of the Army, set forth in Parts 251 and 253 of Title 35, Code of Federal Regulations (C.F.R.) (1982), establish the Panama Canal Employment System and prescribe rules governing wage and employment practices within the System. The mechanism for adjusting rates of basic pay for employees of Federal agencies participating in the System is established in 35 C.F.R. § 251.13, which provides as follows:

Agencies that participate in the Panama Canal Employment System shall consult with each other concerning basic pay for employees and shall refer their recommendations for basic pay to the Panama Area Personnel Board. Upon approval by the Secretary of the Army or his designee of basic wage rates, the rates shall be adopted by the agencies.

The Assistant Secretary of the Army reports that the changes in wage rates effected by the Panama Canal Act have had an adverse impact on employee morale since employees hired on or after the effective date of the Act receive basic pay and annual cost-of-living allowances at a rate substantially lower than employees "grandfathered" at United States wage rates. Further, he states that the Government of the Republic of Panama and labor organizations representing employees stationed in Panama have charged that the wage system is discriminatory as it violates the "equal work-equal pay" principle.

In order to respond to the concerns expressed by the Government of the Republic of Panama and labor organizations, and to improve the competitive posture of Federal agencies operating in Panama, the Panama Area Personnel Board revised the Panama Area Wage Base in January 1982 to conform in principle to the General Schedule, with 10 steps. This revision provided for regular within-grade increases, permitted supervisors to recommend deserving employ-

ees for quality salary increases, and authorized agencies to use the highest previous rate rule, which benefits employees by placing them in a higher step of their grade. These changes were to be reviewed after 1 year to determine whether further adjustments in the wage structure were required.

On October 1, 1982, the Assistant Secretary of the Army approved the minimum 2 percent increase in wage rates authorized by section 1225(b)(2) of the Panama Canal Act. We have been informally advised by a member of the Assistant Secretary's staff that the 2 percent increase was granted on an "automatic" basis, without discussion or consideration of possible enlargement of the increase before October 1, 1983, the date prescribed for the next annual wage adjustment.

In January 1983, the Panama Area Personnel Board completed its review of the January 1982 changes in the Panama Area Wage Base. The Board determined that, among a variety of other measures, an additional 2 percent wage increase was necessary to aid recruitment and retention of qualified personnel in Panama and to improve employee morale. Responding to these findings, the Assistant Secretary decided to grant an additional 2 percent wage increase retroactively effective on October 1, 1982. This determination, as part of a "package" of changes designed to reduce the disparity between the wages of pre-Treaty and post-Treaty employees, was separate from the Assistant Secretary's earlier determination on October 1, 1982, to grant the minimum 2 percent increase required by section 1225(b)(2) of the Panama Canal Act.

The Assistant Secretary now questions whether the additional 2 percent wage increase approved in January 1983 may be implemented retroactively in view of our decisions disallowing retroactive adjustments in pay absent specific statutory authority. It is the Assistant Secretary's position that section 1225(b)(2) of the Panama Canal Act allows retroactive implementation of the wage increases authorized therein. He has advised that, pending the issuance of a decision by our Office, the additional 2 percent increase will be paid prospectively but not retroactively.

As indicated by the Assistant Secretary, we have held as a general rule that retroactive pay increases may be granted only by express authority of Congress. 31 Comp. Gen. 191 (1951); 25 *id.* 601 (1946). Applying this requirement to the terms of section 1225(b)(2) of the Panama Canal Act, we are unable to find specific authority enabling the Assistant Secretary to retroactively implement on October 1, 1982, an additional 2 percent wage increase approved in January 1983. Section 1225(b)(2) states that wage increases of not less than 2 percent of basic pay will be effective on October 1 of each calendar year following the effective date of the Act, and makes no provision for the retroactive implementation of annual wage increases approved subsequent to the specified date.

Absent statutory authority specifically providing for retroactive increases in compensation, we have allowed retroactive pay increases only where such increases do not depend upon the exercise of discretionary administrative authority. Thus, we have allowed retroactive compensation increases where the statute authorizing the increase is mandatory, directing the payment of additional compensation on a certain date without vesting discretionary authority in an administrative official to determine the amount of compensation payable. See 44 Comp. Gen. 153 (1964). In such circumstances, an employee's right to additional compensation arises by operation of law, and cannot be defeated by erroneous administrative action. See generally 24 Comp. Gen. 676 (1945). In contrast, an increase in compensation resulting from the exercise of discretionary administrative authority is effective on the date the proper administrative official approves the increase or on such later date as he may specify, even though the conditions justifying the increase existed prior to the date of the administrative action. B-170113, July 13, 1970; 31 Comp. Gen 462 (1952); and 24 *id.* 676, cited above.

While section 1225(b)(2) of the Panama Canal Act is mandatory in that it requires the effected employees' rates of basic pay to be increased by a mimimum of 2 percent effective October 1 of each calendar year succeeding October 1, 1979, it vests discretion in the administrator of the Act to approve wage increases exceeding 2 percent. Thus, the Assistant Secretary's action in January 1983 approving a 2 percent increase in addition to the minimum 2 percent increase granted previously constituted an exercise of administrative discretion. Under these circumstances, the additional 2 percent increase may be implemented on only a prospective basis, even though the conditions justifying the increase may have existed prior to January 1983.

For the foregoing reasons, we hold that the 2 percent wage increase approved by the Assistant Secretary of the Army in January 1983 may not be retroactively implemented on October 1, 1982.

[B-210532]

Debt Collections—Waiver—Civilian Employees—Compensation Overpayments—Failure to Deduct Insurance Premiums—Optional Life

Employee elected regular and optional life insurance coverage under the Federal Employees' Group Life Insurance Program (FEGLI), but when he transferred in 1969 the new agency stopped deducting his optional insurance premiums due to an administrative error. Since the employee received Leave and Earnings Statements throughout the period in question, which reflected optional premium deductions before his transfer, but not afterward, his failure to examine the statements and to note the error makes him at least partially at fault, thereby precluding waiver under 5 U.S.C. 5584.

Matter of: Frederick D. Crawford—Waiver—Nondeduction of Optional Life Insurance Premiums, August 3, 1983:

Mr. Fredrick D. Crawford, a civilian employee of the United States Army, appeals our Claims Group's September 26, 1980 denial of his request for waiver of a claim against him by the United States for overpayment of compensation in the amount of $674.60. The overpayment resulted from his agency's failure to make proper deductions from his salary for his optional life insurance coverage under the Federal Employees' Group Life Insurance Program (FEGLI). For the reasons stated below, we conclude that waiver should not be granted under the circumstances of this case.

Mr. Crawford, a Procurement Analyst employed by the U.S. Army Tank Automotive Command at Warren, Michigan, elected both regular and optional life insurance coverage under FEGLI on February 20, 1968. Thereafter, he was transferred to the White Sands Missile Station, effective March 23, 1969. At the time of the transfer, the agency failed to note that Mr. Crawford had previously elected coverage under both the regular and optional life insurance plans. As a result, from March 23, 1969, through early February 1978, when the error was discovered, the agency deducted only regular insurance premiums from Mr. Crawford's salary, resulting in a total overpayment of $674.60.

Mr. Crawford initially applied to the Department of the Army for waiver of his indebtedness and, under the provisions of 5 U.S.C. § 5584, the request was forwarded to our Office with the recommendation that waiver be approved in part, and denied in part. In a submission dated March 2, 1979, the Army Finance and Accounting Center recommended that waiver of $639.80 be approved since, in its view, a reasonable person might not have recognized that an error had been made, since several pay changes had occurred during the period in question. In addition, the agency postulated that Mr. Crawford's Leave and Earnings Statements might have confused him since they reflected only one deduction for both regular and optional life insurance prior to September 17, 1977. The agency recommended that waiver of the remaining $34.80 be denied since overpayment of this amount occurred after September 17, 1977, when the Leave and Earnings Statements began to show separate entries for regular and optional insurance deductions.

Despite this recommendation, our Claims Group denied waiver of the erroneous overpayment in its entirety in a settlement letter dated September 26, 1980. Since Mr. Crawford had been provided with Leave and Earnings Statements throughout the period of the overpayment, an examination of which would have apprised the employee of the agency's failure to deduct the optional FEGLI premiums, the Claims Group found Mr. Crawford to be at least partially at fault for the undetected overpayment.

In an appeal dated September 30, 1982, Mr. Crawford asserts that he did not know, and could not reasonably have known, that optional premium payments were not being deducted from his salary since, "deductions for life insurance did show increases over the years and were taken to be the proper accounting for the total insurance coverages (regular and optional)." Moreover, Mr. Crawford claims that the premium deductions of $674.60 are charges for a benefit that he never received, since neither Mr. Crawford nor any other covered family member died or suffered injury while the policy was in effect. Furthermore, he expresses doubt that his family would have been able to receive the optional life benefit if he had died during the term of the policy.

The Comptroller General is authorized by 5 U.S.C. § 5584 to waive claims for overpayment of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States. Such authority may not be exercised if there is an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. Since there is no indication of fraud, misrepresentation, or lack of good faith on the part of the employee in this case, waiver hinges on whether Mr. Crawford is found to be at fault.

We consider "fault" to exist if, in light of all the circumstances, it is determined that the individual concerned should have known that an error existed, but failed to take action to have it corrected. See *Charles J. Zeman,* B-199802, November 28, 1980, and 4 C.F.R. § 91.5 (1983). In making this determination, we ask whether a reasonable person in the employee's position should have been aware that he was receiving payment in excess of his proper entitlements. See *George R. Beecherl,* B-192485, November 17, 1978, and *Charles J. Zeman,* above.

If an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documents for accuracy or otherwise fails to take corrective action, he is not without fault, and waiver will be denied. See *Bernard J. Killeen, Jr.,* B-198207, August 22, 1980; *John J. Doyle,* B-191295, July 7, 1978. This rule is particularly relevant in the case of Leave and Earnings Statements. As we stated in *Arthur Weiner,* B-184480, May 20, 1976, we cannot stress too highly the importance of a careful review by each employee of the pay data provided by the employing agency. Such review, and reporting of discrepancies for remedial action, is an essential function in the Government's attempt to reduce payroll errors. Thus, if an employee is given a Standard Form (SF) 50 showing that he has life insurance coverage but his Leave and Earnings Statements show that premiums were not withheld, the employee has notice of an error and is ordinarily considered to be at least partially at fault if he fails to take corrective action. *John J. Doyle,* above.

In this case, Mr. Crawford's transfer to the White Sands facility was initially documented by an SF-50, dated March 24, 1969, which erroneously indicated that he had elected only regular life insurance coverage. This error was later corrected, however, by a second SF-50, dated April 23, 1969, which properly indicated that Mr. Crawford had elected both regular and optional insurance coverage. The record futher indicates that Mr. Crawford received biweekly Earnings Statements both before and after his transfer to the White Sands facility. We believe that an examination of those statements should have revealed the underdeduction to Mr. Crawford, for the amount deducted for his insurance coverage was considerably less than the amount which should have been deducted on a biweekly basis for both regular and optional coverage. This underdeduction should have been particularly evident to Mr. Crawford during the first year after his transfer, since his total biweekly insurance deductions during that period (at $3.58 initially, and, later, at $3.85), were less than the amount which should have been deducted for optional insurance alone, which was then $6.00 each pay period.

Furthermore, in completing Mr. Crawford's application for waiver, dated September 20, 1978, the agency stated as follows:

> Mr. Crawford stated, he had not verified the pay computation shown on his earnings and leave statement in detail necessary to determine optional life insurance was not being deducted from his earnings and that he did not have insurance tables to determine the exact amount of insurance premiums that should have been deducted.

Since Mr. Crawford was aware that he had elected optional life insurance coverage, and since the agency's failure to deduct the optional premiums should have been apparent from an examination of the Leave and Earnings Statements provided, we must conclude that Mr. Crawford was on notice of the overpayment, and thereby deny waiver.

Mr. Crawford also asserts that he may have received no benefit from the optional insurance coverage since it is not clear to him that his beneficiary would have received payment had he died. Contrary to Mr. Crawford's belief, his beneficiary would have received the life insurance if he had died during the period after he elected coverage even though no premium payments were deducted from his wages. Under 5 C.F.R. §§ 871.203 and 871.204, optional insurance can be cancelled only by the employee's ineligibility for coverage or the employee's written cancellation. See *Thomas O. Marshall, Jr.,* B-190564, April 20, 1978. For this reason, we have held that it is not against equity and good conscience to require an employee in Mr. Crawford's situation to pay for the life insurance protection provided.

For the reasons set forth above, we sustain the determination by our Claims Group denying Mr. Crawford's request for waiver.

[B-210963]

Pay—Additional—Diving Duty—Requirements

To qualify for special pay for diving duty, under 37 U.S.C. 304(a), an individual must be assigned to, maintain a proficiency in, and actually perform diving duty. Each requirement must be met before special pay begins to accrue. Therefore, where a member was assigned to duty as a student at Officer Candidate School during which he did not actually perform diving duty, although he may have met the other requirements, he may not receive special pay. 37 Comp. Gen. 546 is distinguished.

Matter of: Petty Officer Rodney L. Kruse, USN, August 3, 1983:

This action is in response to a request for an advance decision to determine the legality of paying Petty Officer Rodney L. Kruse, USN, special pay for diving duty to which he was assigned while attending Officer Candidate School. We find that he is not entitled to the special pay because he did not actually perform diving duty during that period.

The question was submitted by the Disbursing Officer, Naval Personnel Support Detachment, Newport, Rhode Island, and has been assigned submission number DO-N-1413 by the Department of Defense Military Pay and Allowance Committee.

Petty Officer Kruse was transferred from duty at San Diego, California, to temporary duty for instruction at the Officer Candidate School, Naval Education and Training Center, Newport, Rhode Island, beginning July 31, 1982, and, thereafter for further assignment. While the duration of the temporary assignment is not apparent from the record furnished us, we presume that it exceeded one month, as is usually the case. Petty Officer Kruse's original orders were modified to indicate that "primary duty involving diving" was an essential part of his military duty. However, as a student at the school he did not actually perform any diving duty.

Under 37 U.S.C. § 304(a), as amended by Public Law 97-60, § 115, October 14, 1981, a member of the armed services is entitled to special pay for diving duty when the individual:

(1) Is assigned by orders to the duty of diving;
(2) Is required to maintain proficiency as a diver by frequent and regular dives; and
(3) Actually performs diving duty.

Implementing regulations found in paragraph 11101a (interim change No. 375, effective July 1, 1982) of the Department of Defense Military Pay and Allowances Entitlements Manual follow the language of the statute almost verbatim as to the prerequisities for the special pay. The legislative history of the 1981 version of 37 U.S.C. § 304 indicates that Congress, in accepting the Senate's version of the bill, clearly intended that all three requirements of the statute had to be met before an individual became entitled to the

special pay. In rewriting the section,* the Senate noted that under then current law, special pay for diving duty accrued when an individual was assigned to, maintained a proficiency in, and actually performed diving duty. Its goal was to maintain that policy but also to raise the amount of special pay. S. Rep. No. 97-146, 97th Cong., 1st Sess. 10 (1981); *See also* Conf. Rep. No. 97-265, 97th Cong., 1st Sess. 7, 23 (1981).

In rewriting subsection (a), and dividing it into three parts, Congress attemped to make its intentions clear. However, the use of the conjunction "and" between clauses (a)(2) and (a)(3) may have led to the confusion in this case as to when special pay begins to accrue. A number of courts have considered similar statutory construction problems and have held that where a number of items or requirements are listed in a statute and connected by conjunction (e.g. "and") only before the last of the series, "the same connective is understood between the previous members." *Wilcox* v. *Warren Construction Co.*, 95 Or. 125, 186 Pac. 13 (1919); *Lithium Corporation of America* v. *Town of Bessemer City,* 261 N.C. 532; 135 S.E. 2d 574, 577 (1964); *People* v. *Donner*, 435 N.Y.S. 2d 225, 227 (1980). *See generally* Sutherland Stat. Const. 21.14 (4th Ed.).

With "and" being the similar connective in the present case, it is clear that Congress intended that all three requirements of the statute be met for an individual to qualify for special pay.

We note that the Naval Military Personnel Manual, which prescribes requirements for qualifying as a Navy diver and maintaining such qualification, provides that Naval personnel may receive special pay for diving when the following criteria are met:

(a) Member is a designated diver or under training for a specific diver designation.
(b) Member's diving qualifications are current.
(c) Member is under competent orders to diving duty * * *.

Naval Military Personnel Manual, art. 2620200. The regulation further provides that entitlement to special pay for diving duty shall not be interrupted during periods of authorized leave or temporary additional duty.

In some circumstances, the dives performed by a member to maintain his diving qualifications will suffice to meet the actual performance requirement of the statute. We held, for example, that helium-oxygen divers, who qualified for incentive pay for a fixed period by performing the requisite dives at the beginning of that period, were entitled to such pay for the remainder of that period, provided their duty assignments aboard helium-oxygen equipped vessels were not terminated. 37 Comp. Gen. 546, 550 (1958).

Unlike those divers, who were required by normal ship operations to perform helium-oxygen diving, Petty Officer Kruse was assigned to duty as a student at the Officer Candidate School,

* Prior to 1981, Section 304(a) reads as follows:

Under regulations prescribed by the Secretary concerned, a member of a uniformed service who is entitled to basic pay and who is assigned by orders to the duty of diving is also entitled to special pay at a rate not more than $110 a month for periods during which diving duty is actually performed. A member may not be paid special pay under this subsection in addition to incentive pay authorized under section 301 of this title. 37 U.S.C. § 304(a) (1976).

where notwithstanding the statement in his amended orders, he was not actually performing diving duty. His assignment to the unit in which diving duty was required was terminated and he was assigned on temporary duty to a course of instruction leading to commissioning as an officer. Following that course of instruction he was to be given another permanent assignment.

As stated earlier, article 2620200 of the Personnel Manual provises that entitlement to diving duty pay shall not be interrupted during periods of temporary additional duty. However, since Petty Officer Kruse's assignment to a unit in which diving duty was required was terminated, this paragraph is not authority for continuing his diving pay.

Although his orders were amended to indicate that he was assigned to diving duty while at Officer Candidate School, that was not the case. Such an amendment to orders cannot supply the requirement imposed by statute if that amendment is not in keeping with the facts. Further, since Petty Officer Kruse did not actually perform diving duty, as required by 37 U.S.C. § 304(a)(3), he is not entitled to the special pay for the period of his duty as a student at the Officer Candidate School.

[B-210834]

Disbursing Officer—Altered Check Cashed—Full Restitution Made—Account in Balance—Relief Not Necessary

When dishonest payee who altered Government check for final pay makes full restitution of all amounts over and above his entitlement which were fraudulently obtained from military disbursing officer, account may be considered in balance. 27 Comp. Gen. 674 is explained and distinguished.

To Brigadier General Robert B. Adams, Department of the Army, August 5, 1983:

This decision is in response to your request of February 14, 1983, to relieve Army Captain D.F. Mills, Finance Officer, 3rd Armored Division, from liability for a $58 shortage of funds in accounts entrusted to him. For the reasons explained below, we do not think that Captain Mills' account is short by $58 and therefore there is no need to seek relief for him or for his class A agent, Second Lieutenant Stanley M. Jackson. The account should be adjusted accordingly.

On December 31, 1980, former Specialist 4th Class Ronald G. Uher II was issued a $58 check representing his end-of-month December 1980 pay. He then altered the check so that it appeared to have been issued for $258. When presented with this check, Lieutenant Jackson cashed it for $258, without detecting the fraudulent alteration.

When the fraud was discovered, Mr. Uher was apprehended. He confessed to the alteration and returned $200. The Government's

account was thus placed in the same position it would have been in if the fraudulent alteration had not taken place.

Your assumption that there is still a $58 shortage in Captain Mills' account is apparently based on a 1948 Comptroller General's decision, 27 Comp. Gen. 674, according to the documents submitted with your request. We stated in that case:

> It is well established that a fraudulent and material alteration of a check destroys its validity insofar as the person who made the alteration is concerned and extinguishes as to him the maker's obligation it was intended to satisfy.

You then concluded that the Government did not owe Mr. Uher his final pay of $58 as a result of his actions and since he did not return that sum, the account was short.

That interpretation of our decision is quite understandable but is not for application in this case. If read in context, it becomes evident that 27 Comp. Gen. 674 was concerned with the negotiability of the altered instrument, both as to the original payee and as to a bank which failed to detect an obvious alteration. Under such circumstances, we said, we are not required to honor the check. Our case did not discuss the validity of the underlying debt where the Government has already paid out the amount owed. Mr. Uher was entitled to his $58 final pay. The Government would have had no basis to retain his pay even if it had successfully recovered that amount from him since he made full restitution for all the sums to which he was not entitled. Therefore, the $58 should be recorded as a valid disbursement and the account adjusted accordingly.

[B-211514]

Bonds—Bid—Surety—More Than One—Pledging Same Assets—Propriety

Agency's rejection of low bid as nonresponsive, because individual sureties submitted on a bid bond pledged the same assets, was improper where affidavit submitted disclosed a net worth which was more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond and where bid bond was legally sufficient to establish the joint and several liability of the sureties. Furthermore, Defense Acquisition Regulation 10.201.2 does not require that the two sureties have two separate pools of assets.

Matter of: Fitts Construction Co., Inc., August 9, 1983:

Fitts Construction Co., Inc. (Fitts), protests the rejection of its bids by the Naval Facilities and Engineering Command under invitations for bids (IFB) Nos. N62477-82-B-8012 and N62477-82-B-0027. Fitts' bids were rejected as nonresponsive because the individual sureties submitted by Fitts as bid security pledged the same assets. The Navy takes the position that the failure to have separate pools of assets for each surety detracts from the joint and several liability of the sureties and, therefore, relates to bid responsiveness rather than responsibility. Further, the Navy argues that Defense Acquisition Regulation (DAR) § 10.201.2 (1976 ed.) antici-

pates that the two sureties submitted as bid security have two separate pools of assets.

We sustain the protest.

The two contracts were for miscellaneous repairs and improvements to two Navy buildings. Fitts was the low bidder in response to both IFB's. Each IFB required that a bid guarantee, in the amount of 20 percent of the largest amount for which award can be made under the bid, be submitted with each IFB. Fitts complied with this requirement, submitting a bid bond for each IFB listing two individual sureties. The penal amount of the bond for IFB No. N62477-82-B-8012 was $8,567 and for IFB No. N62477-82-0027 was $18,000, 20 percent of the bid amounts. The individual sureties listed by Fitts are husband and wife. They completed and submitted separate affidavits of net worth (Standard Form 28), but each affidavit listed identical assets and indicated an identical net worth of $802,775.

We disagree with the Navy's view that the issue raised in the present case relates to bid responsiveness. The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the invitation's material terms and conditions. 49 Comp. Gen. 553, 556 (1970). This determination of responsiveness must be made from the bid documents at the time of bid opening. *Peter Gordon Company, Inc.,* B-196370, July 18, 1980, 80-2 CPD 45. We have held that a solicitation provision calling for a bid guarantee is a material requirement which cannot be waived. 38 Comp. Gen. 532 (1959). We have also recognized that a bid is nonresponsive where either the required bond is not submitted, *de Weaver and Associates,* B-200541, January 6, 1981. 81-1 CPD 6, or the submitted bond contains a deficiency which detracts from the joint and several liability of the sureties on the bond. See *Structural Finishing, Inc.,* B-201614, April 21, 1981, 81-1 CPD 303, and *Southland Construction Co.,* B-196297, March 14, 1980, 80-1 CPD 199 (bid nonresponsive where bond was altered without any evidence of approval by the surety); *Cassidy Cleaning, Inc.,* B-191279, April 27, 1978, 78-1 CPD 331 (blank bid bond submitted).

The bid bond furnished by Fitts was duly executed by two individual sureties whose affidavits indicated that they both had net worths at least equal to the penal amount of the bond and was not otherwise defective on its face. Neither surety in this case was in a position to disavow the obligation under the bond since both expressly agreed to indemnify the Government in a specified amount. The bond thus met the solicitation's bonding requirement and was legally sufficient to establish the joint and several liability of the sureties in the event of default on the bid by Fitts. Accordingly, we find that the Navy's determination that the bid submitted by Fitts

was nonresponsive was improper since the question of the acceptability of individual sureties is one of bidder responsibility. *Dan's Janitorial Service, Inc.*, 61 Comp. Gen. 592 (1982).

Furthermore, we find no support for the argument asserted by the Navy that the DAR requires that there by two separate pools of assets for each surety. In B-172750, September 27, 1971, we considered a situation in which a husband and wife served as individual sureties and where only one Affidavit of Individual Surety was submitted. We found that since the affidavit contained the signatures of both the husband and the wife, an intent was manifested that the affidavit be an affidavit from two sureties. Also, we found that the applicable procurement regulations concerning the net worth of each surety were satisfied since the affidavit disclosed a net worth more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond.

In the present case, the penal amount of the bonds for the two IFB's totaled $26,657. The net worth disclosed by the affidavits was $802,775, which is clearly adequate to cover each surety's obligation to have a net worth at least equal to the penal amount of the bond. Accordingly, there was no basis for concluding that the sureties were not acceptable. *Dan's Janitorial Service, Inc., supra.*

However, since performance is approximately 50 per cent complete on both projects, we are not recommending that either contract be terminated. In these circumstances, corrective action would not be in the Government's best interests.

[A-67190]

Prisons and Prisoners—Federal Prison Industries—Products—Requirement of Federal Agencies to Purchase—Exceptions

Forest Service, Department of Agriculture, is not required to request clearance from Federal Prison Industries Incorporated (FPI) when making purchases from private sources using funds appropriated by Public Law 98-8. 18 U.S.C. 4124 generally requires Federal agencies to buy all FPI products which meet their requirements from FPI rather than from private sources. Public Law 98-8 (98th Cong., 1st sess., 97 Stat. 13 (March 24, 1983)) is an emergency measure which appropriates funds for projects designed to combat the economic recession occurring at the time of its passage. Specific legislation prevails over general. Since private purchases further the Act's purposes the requirement to purchase from FPI does not apply.

Matter of: Forest Service—Requirement to procure from Federal Prison Industries Inc., August 12, 1983:

The Director of Administrative Services, Forest Service, Department of Agriculture, requested our decision on whether the statutory requirement to make purchases from Federal Prison Industries, Inc. (FPI) applies when the Service is conducting activities funded by appropriations made in Public Law 98-8.

We hold that the Forest Service is not required to make purchases from Federal Prison Industries, Inc. when carrying out its

responsibilities under Public Law 98-8. Requiring such purchases from FPI is inconsistent with the law's purposes as explained below. Accordingly, the Service may procure goods from private sources without requesting FPI clearances when spending funds appropriated by Public Law 98-8.

Public Law 98-8 (98th Cong., 1st Sess., 97 Stat. 13 (March 24, 1983)) is an emergency appropriations measure which Congress enacted in response to the economic recession occurring at the time of its passage. Generally, the law makes appropriations to Government agencies which are designed to ease unemployment and stay the rise of business failures. A corollary purpose is to "hasten or initiate Federal projects and construction of lasting value to the Nation and its citizens." The Act is prefaced with the following statement of Congressional findings:

> It is the sense of the Congress that the continued economic recession has resulted in nearly fourteen million unemployed Americans, including those no longer searching for work, rivaling the actual numbers of unemployed during the Great Depression. Other millions work only part-time due to the lack of full-time gainful employment. The annual cost of unemployment compensation has reached the staggering total of $32,000,000,000. The hardships occasioned by the recession have been much more severe in terms of duration of unemployment and reduced percentage of unemployed receiving jobless benefits than in previous recessions.
>
> Actual filings of business related bankruptcies for the year ending June 30, 1982, reached a total of seventy-seven thousand as compared with a prior year figure of sixty-six thousand. Business failures are up 49 per centum compared to one year ago. Delinquencies are many times greater. The American farmers are more than $215,000,000,000 in debt. Hundreds of thousands of farmers are faced with bankruptcy.
>
> * * * * * * *
>
> Under these circumstances, the Congress finds that a program to provide for neglected needs of the Nation which results in productive jobs, and to provide humanitarian assistance to the indigent and homeless, to be very strongly in the national interest.

Consistent with these findings, the Act provides appropriations to the Forest Service as follows:

> PRESERVING THE NATIONAL FOREST SYSTEM
>
> To restore, repair, and provide forest roads, trails, and other existing facilities which are part of the real wealth of this country, there is appropriated an additional amount of $25,000,000 to remain available for obligation until September 30, 1984, for the "National Forest System."
>
> In order to provide jobs, to improve the growth rate of existing forested land inventories, and to decrease the number of deforested acres of Forest Service lands, there is appropriated an additional $35,000,000 for "National Forest System," Forest Service.
>
> In order to provide jobs which will result in the construction of real assets for this country, an additional amount of $25,000,000 is appropriated, to remain available until expended, for "Construction," Forest Service.

Federal Prison Industries, a government corporation of the District of Columbia, conducts a program of industrial training and employment for inmates of Federal penal and correctional institutions under the provision of 18 U.S.C. §§ 4121-4128 (1976). The program is designed to give inmates the opportunity to acquire knowl-

edge and skill in trades and occupations which will provide them with a means of earning a livelihood upon release. 18 U.S.C. § 4123 (1976). In the process, the inmates produced various goods for sale by FPI.

Federal agencies are required to buy all FPI products which meet their requirements from FPI rather than from private sources. 18 U.S.C. § 4124 (1976). Generally, an agency must obtain a clearance from FPI in order to purchase an item which is available through FPI from another source. 41 C.F.R. § 1-5.408 (1982).

The Forest Service indicates that it needs to buy items which are available from FPI to carry out its responsibilities under Public Law 98-8 but it questions whether requiring it to purchase these items from FPI is consistent with the Act's purposes. For example, the Service acquires roadsigns in providing forest roads and trails and it needs paint brushes and tarpaulins to restore forest facilities. These items may be obtained from FPI or from local private sources. Purchasing needed items from private sources furthers the Act's purposes of counteracting the continued economic recession by providing emergency expenditures to create productive jobs and aid business. Employment is created because labor is used to produce and ship the goods and business is aided because the vendor sells items he otherwise would not have and thereby adds to his profit. However, such private procurements (without FPI clearances) would appear to be in conflict with the requirements of 18 U.S.C. § 4124 (1976).

Because of the Act's specific nature, furthering its purposes may take precedence over the more generally applicable restrictions of 18 U.S.C. § 4124 (1976). It is a well-established principle of statutory construction that when construing two seemingly conflicting pieces of legislation the more specific provision governs over the general. B-152722, August 16, 1965. Public Law 98-8 is the more specific Congressional statement. It is emergency legislation directed at alleviating an immediate economic problem while 18 U.S.C. § 4124 is applicable to agencies of the Government generally and indefinitely. It appears that at this time Congress is more concerned that the funds which Public Law 98-8 appropriates be used to provide expeditious aid to private industry and labor rather than that they be used to provide support for the ongoing inmate training program. Accordingly, when the Forest Service intends to expend funds appropriated by Public Law 98-8, it need not seek FPI clearance.

We have held previously that agencies may make purchases without requesting FPI clearance under similar statutes, as the Service notes. In 15 Comp. Gen. 415 (1935) we considered whether the Army was required to obtain a certificate of clearance before purchasing a brush from a private source with funds made available by the Emergency Relief Appropriations Act of 1935. That Act made appropriations, "to provide relief, work relief, and to increase employment by providing for useful projects." We concluded that

"[t]he making of such purchases from the Federal prisons would appear to be out of line with the purpose for which the appropriation was made" and therefore a certificate of clearance was unnecessary. 15 Comp. Gen. 415. (See also A-67191, November 9, 1935, *re* purchase by the Army of tarpaulins for use as truck covers in Civilian Conservation Corps Camp with funds appropriated by Emergency Relief Appropriation Act of 1935.)

In A-67190, A-67191, March 27, 1936, we were asked to decide whether the Federal Emergency Administration of Public Works was required to seek FPI clearance when purchasing articles with funds appropriated to carry out the purposes of the National Industrial Recovery Act of 1933. 48 Stat. 195 (June 16, 1933). That Act's declaration of policy read:

> * * * It is hereby declared to be the policy of Congress * * * to promote the fullest possible utilization of the present productive capacity of industries, * * * to reduce and relieve unemployment, to improve standards of labor, and otherwise rehabilitate industry * * *.

Section 206 specified that no convict labor was to be used on any project the Act authorized. However, the implementing regulation provided that no materials produced by convict labor were to be directly incorporated into projects, "except in those cases in which the use of such materials is required by applicable statutes." We held that since no clearance request was required in view of the Act's provisions and implementing Executive orders, the GAO would not object to a change in the implementing regulations to permit procurement from the private sector without first securing clearance from the FPI. Such a change was subsequently made.

The rationale of the cases discussed above is generally applicable here because the purposes of the earlier acts are essentially the same as Public Law 98-8. Accordingly, the Forest Service need not request certificates of clearance from FPI when making purchases using funds which Public Law 98-8 appropriates.

[B-210645]

Officers and Employees—Resignation—Separation Date Changes

Widow of former employee seeks to cancel employee's resignation on January 9, 1982, and substitute sick and annual leave until employee's death on July 3, 1982. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no evidence of administrative error, violation of policy or regulation, or contrary intent which would warrant a change in the employee's separation date.

Matter of: Kenneth A. Gordon—Change of Separation Date in Order to Use Accumulated Leave, August 12, 1983:

The issue here concerns whether a former employee's resignation date may be moved forward 6 months to the date of his death which would permit payment for accumulated sick leave, life insur-

ance benefits, and a survivor's retirement annuity. We hold that the separation date may not be changed in the absence of administrative error, the failure to follow agency regulations, or the failure to conform to the intent of the parties, none of which is evident in this case.

This decision is in response to a request from the Honorable Mark S. Fowler, Chairman, Federal Communications Commission (FCC). The request is in response to a claim from the widow of a former FCC employee, Kenneth A. Gordon.

Mr. Gordon was employed by the FCC from September 1971, until January 9, 1982, when he "very unexpectedly" resigned stating as his reasons, "[p]ay cap limits objectives." It appears that in April 1982 Mr. Gordon showed signs of illness, and he subsequently died of cancer on July 3, 1982. Mrs. Gordon seeks to change Mr. Gordon's resignation date from January 9 to July 3, 1982, which would permit payment for unused sick leave (735 hours) and would result in her entitlement to life insurance benefits and a survivor's annuity.

Mrs. Gordon claims that her late husband was unaware of his terminal illness until shortly before his death, but that according to the doctors, his illness had been developing for some time, as much as 2 years earlier. Mrs. Gordon argues that his illness reduced his ability to function normally during the period prior to his resignation and reduced his capacity to make a responsible decision regarding his resignation.

The agency report states that had they known of Mr. Gordon's medical condition, they would have counseled him concerning disability retirement and encouraged him to remain on the rolls pending a medical review for retirement purposes. The agency notes, however, that Mr. Gordon did not state ill health as a reason for his resignation, although his sudden resignation was considered, "uncharacteristic from our perspective."

Our decisions have held that generally the date of separation by resignation is the date tendered by the employee, and such date may not be challenged once it becomes an accomplished fact. *Ralph R. Sturges*, B-189895, November 2, 1977, citing 32 Comp. Gen. 111 (1952). An employee may not be restored to a pay status for any period subsequent to the date of separation for the purpose of granting leave unless there was an administrative error or a violation of a regulation or policy in effecting the separation. B-164232, May 28, 1968. See also Federal Personnel Manual, Chapter 715, S1-2a. Thus, we have permitted corrective action when the circumstances of a particular case show that the resignation was not accepted in the terms submitted or that the resignation as executed did not conform to the intentions of the parties. 21 Comp. Gen. 517 (1941).

There does not appear to be any violation of policy or regulation in this case since there is no indication that the agency knew or

should have known of his illness. As the agency points out, the Federal Personnel Manual, Chapter 715, S2-5, suggests counseling employees who propose to resign for reasons of ill health in order to review the advisability of disability or optional retirement. Our prior decisions permitting changes in the separation date have involved situations where the agency was aware of the employee's illness and should have permitted the use of sick leave prior to the employee's retirement. See B-175201, June 2, 1972, and B-174708, February 4, 1972. However, in the present case Mrs. Gordon admits that no one knew of Mr. Gordon's illness until very shortly before his death. Therefore, there is no evidence of any violation of policy or regulation in failing to counsel Mr. Gordon prior to his resignation.

As to the intent of the parties, there is no indication that Mr. Gordon requested anything other than resignation. See, for example, our decision in *Sturges,* cited above, where we had to resolve doubt as to whether the employee wished to resign or take a leave of absence. We concluded in *Sturges* that the employee intended to resign based on the evidence before us. In the present case, we have no evidence to the contrary of Mr. Gordon's intent to resign except the statement from Mrs. Gordon that had he known of his illness he would not have intended to resign. This does not establish contrary intent sufficient to change his separation date.

Finally, Mrs. Gordon suggests that the illness reduced Mr. Gordon's capacity to make a responsible decision regarding his resignation. There is no evidence in the record before us of mental problems or diminished mental capacity. As we held in *Sturges,* cited above, a judicial adjudication of incapacity would be required in order to limit the legal rights and powers of an adult. See Texas Civil Statutes, Probate Code, Chapter IX, and Texas Civil Statutes, Article 5547-83. In the absence of such a determination, we must presume that Mr. Gordon had the legal mental capacity to discharge his rights and obligations.

Accordingly, we find no basis to allow a change in Mr. Gordon's separation date in order to grant him accumulated sick and annual leave to the date of his death. Therefore, Mrs. Gordon's claim may not be allowed.

[B-210493]

Compensation—Holidays—Leave Without Pay Status—Before and After Holiday—Gradual Retirement Plan Participation

A regularly scheduled full-time employee participated in one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 and B-206655, May 25, 1982, are distinguished.

Matter of: Richard A. Wiseman—Gradual Retirement Plan—Pay for Nonworked Holidays, August 15, 1983:

This decision is issued at the request of the Finance and Accounting Officer, National Security Agency, on the question of whether an employee may be paid for a holiday where he was in a leave without pay (LWOP) status on the workday before and the workday following the holiday. The question is answered yes for the following reasons.

Mr. Richard A. Wiseman, was as regularly scheduled full-time employee of the National Security Agency. On August 28, 1982, he requested to participate in the agency's Gradual Retirement Plan, choosing Option 2, which permitted him to reduce his number of days at work, with such other days to be covered by being in an LWOP status.

Mr. Wiseman chose to work regular hours on Monday, Tuesday and Thursday, with Wednesdays and Fridays covered by LWOP. That arrangement was agency approved. In November 1982, two holidays occurred on Thursdays, Veterans Day (November 11) and Thanksgiving (November 25). Mr. Wiseman did not work on either of those 2 days nor was he paid for them.

The submission, quoting a portion of the agency's regulations governing entitlement to pay for nonworked holidays, expresses the view that the intent of the applicable provisions appears to be to deny pay for a nonworked holiday when it is presumed that there was no intention of the individual to work on the holiday. It goes on to point out that even though Mr. Wiseman's status on Wednesdays and Fridays was LWOP, since LWOP on these 2 days was a part of his regular weekly schedule, there is every reason to believe that he would have reported to work on his regularly scheduled Thursday workday, but for the fact that it was a holiday.

The Gradual Retirement Plans for the National Security Agency devised under authority of Department of Defense Instruction 1412.3, Retirement Planning Programs, is contained in Section 18, of chapter 379.18, NSA/CSSPMM 30-2. Those provisions generally authorize an employee to gradually enter retirement through a reduction of work activities for a short period immediately preceding full retirement and in contemplation of such retirement.

Paragraph 18-6 of those regulations provide five optional plans. Plans 1 and 2 permit an employee to work reduced but scheduled worktime (not less than 24 hours), and combine that reduced schedule with either annual leave or LWOP, respectively, to make up the remaining hours to total a 40-hour workweek. Plan 3 permits an employee to change from being a full-time employee to a part-time employee. Plan 4 permits a full-time employee to become an intermittent employee and perform duty on an unscheduled agency operational activity basis. Plan 5 permits the employee to actually

retire and be immediately reemployed on a less than full-time basis.

In 18 Comp. Gen. 206 (1938), we ruled that in the absence of other unusual facts or circumstances, the presumption that a regularly scheduled employee was relieved or prevented from working on a holiday required a showing that he was on duty at the close of the workday before and at the beginning of the workday following the holiday. In 45 Comp. Gen. 291 (1965) we authorized a modification of that presumption to permit payment for such nonworked holidays even though the employee was in an authorized leave of absence on one of those workdays so long as he was in a pay status on the other workday.

Because these two decisions and several others seemed to permit differing holiday pay administration among various agencies, we were requested to clarify the matter. In *Matter of Pay for Holiday not Worked,* 56 Comp. Gen. 393 (1977), we ruled that so long as an employee is in a pay status on either the workday preceding a holiday or on the workday succeeding a holiday, he is entitled to straight-time pay for the holiday even though he is in an authorized LWOP status or, for that matter, in an absent without leave status on the other workday.

In decision *Matter of Employees of the Government Printing Office,* B-206655, May 25, 1982, we considered the question of entitlement of employees to be paid for the half-day they were excused from duty on December 24, 1981, on the recommendation of the President. Citing to 56 Comp. Gen. 393, *supra,* we permitted employees who were in a pay status during the earlier part of that day or at the beginning of the first workday following to be paid for that absence. However, we ruled that employees who were in a LWOP status on December 24th and also on the first workday following, would not be entitled to pay for the excused period.

The ruling in that case, of course, was predicated on the fact that the employees who were in an LWOP status, before and following the Presidentially excused period, were apparently in an indefinite LWOP status, which would have included all days in between. As a result, the presumption that such an employee would be prevented from working a day designated as a holiday within such a period would not arise.

We believe the present case is distinguishable from those two cases. Mr. Wiseman, as a full-time employee, had a regular but reduced weekly schedule of work which included 2 days of LWOP, specifically scheduled for Wednesdays and Fridays. In view of the fact that Plan 2 of the Gradual Retirement Program required the specific scheduling of worktime not less than 24 hours in any 1 week, then each of the 3 days he was scheduled to work would have to be covered by a pay status in order for him to retain eligibility under the Program. Thus, in cases like Mr. Wiseman's where days of work are specifically scheduled during a workweek and one

of those days is designated as a holiday even though it is bounded by scheduled LWOP days, it may be presumed that but for the holiday occurrence on that day, the employee would have worked.

It is our view, therefore, that Mr. Wiseman may be paid for the two Thursday holidays which occurred in November 1982, if otherwise correct.

[B-208679]

Compensation—Severance Pay—Eligibility—Involuntary Separation—Religious Reasons

A National Guard member was denied reenlistment as a result of his refusal to attend training drills on Saturdays which required his removal as a civilian National Guard technician. He was denied severance pay on the ground of delinquency in refusing to work on Saturdays. We hold that he is entitled to severance pay under 5 U.S.C. 5595 because his refusal to attend Saturday drills based on his religious beliefs was not delinquency within the meaning of the statute. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Matter of: Terrill J. Kawcak—National Guard Technician—Severance Pay, August 23, 1983:

The issue presented involves the eligibility of a National Guard technician for severance pay under 5 U.S.C. § 5595 (1976). He was separated from his civilian position as a result of losing his military membership when he was denied reenlistment in the New Mexico Air National Guard due to his religious beliefs which prevented him from attending drills on Saturdays. For the reasons stated below, we hold that the claimant is entitled to severance pay.

BACKGROUND

This decision is in response to a request from the National Federation of Federal Employees (union) concerning the eligibility of Mr. Terrill J. Kawcak, a former member of the New Mexico Air National Guard (NMANG), for severance pay. This decision has been handled as a labor-relations matter under our procedures contained in 4 C.F.R. Part 22 (1982), and in this regard we have received comments on this matter from the union and the NMANG.

Mr. Kawcak was an excepted service technician subject to the dual status requirements of 32 U.S.C. § 709(b) (1976). A person employed under this section is a civilian technician, and his employment thereunder is dependent upon his continued National Guard membership. As a National Guard member, Mr. Kawcak was required to participate in one 2-day drill each month, normally on a Saturday and Sunday, plus 15 days of annual training. This requirement conflicted with one of the tenets of his church, the Worldwide Church of God, which calls for strict observance of the Sabbath from sundown Friday to sundown Saturday. On certain occasions Mr. Kawcak was able to avoid the requirement that he

attend drill on Saturday by virtue of the "appropriate duty" procedure, whereby he was excused from monthly drill and made up the missed time on another designated occasion. On three occasions however, permission to be absent was denied and Mr. Kawcak refused to attend the drills. Subsequently, Mr. Kawcak's request for reenlistment was denied and his employment as a civilian technician was terminated. Based on the circumstances underlying Mr. Kawcak's termination, NMANG determined that he was not entitled to severance pay.

Mr. Kawcak brought an action in the United States District Court for the District of New Mexico seeking a permanent injunction ordering the NMANG to rescind his discharge and approve his reenlistment. In its decision *Kawcak* v. *New Mexico Air National Guard,* Civil Action No. 81-745-JB (May 7, 1982), the district court framed the fundamental issue as whether or not the NMANG could demand as a condition of Mr. Kawcak's reenlistment that he participate in Saturday exercises.

The court stated that it "is sympathetic with Plaintiff's position and is convinced of the sincerity of the Plaintiff's beliefs and his desire to observe his religion." Nevertheless, the court found that his right to exercise his religion must bend to accommodate military needs and that the NMANG had met the burden of demonstrating a compelling state need. Accordingly, the court upheld the discharge and granted summary judgment for the defendants. However, "[d]ue to the gravity of the constitutional rights involved and the relative strength of Plaintiff's challenge * * *," the court found that each party should bear its own costs.

Mr. Kawcak's claim before this Office involves his entitlement to severance pay under 5 U.S.C. § 5595 (1976). That section provides that an employee who has been employed for a continuous period of at least 42 months and is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, is entitled to be paid severance pay in regular pay periods by the agency from which separated.

The New Mexico Air National Guard's Technician Personnel Officer (TPO) reports that Mr. Kawcak's separation was due to his loss of military membership which in turn directly resulted from his voluntary actions altering his military status. The TPO points to National Guard Bureau Technician Personnel Publication regulation 302.7 (March 17, 1981) which provides as follows:

> *Voluntary Military Disqualification* When a technician takes a voluntary action that alters his military status (i.e., applies for a commission, acknowledges his intention to resign from the Guard or not to reenlist, accepts certain promotions, etc.), immediate steps should be taken by the TPO to notify the individual regarding loss of technician employment. The notification should address loss of benefits, ineligibility for severance pay and discontinued service retirement, etc.

The NMANG determined that Mr. Kawcak was delinquent in electing not to attend training assemblies on Saturdays, and this delinquency was the basis for his loss of military membership and his

resulting removal from his civilian technician position. Accordingly, severance pay was precluded in such circumstances.

ANALYSIS AND CONCLUSION

The decisions of this Office have consistently followed the statutory requirement that the tenure of a technician in his civilian position is contingent upon the continuation of his military status, and that when such military status ends the technician's civilian employment is terminated automatically in accordance with the law and implementing regulations. Under such conditions the termination of civilian employment, contrary to the wishes and desires of the technician, is an involuntary separation. Thus, in the case cited by Mr. Kawcak, B-172682, June 14, 1971, concerning the eligibility of National Guard technicians for severance pay if they are separated from their civilian positions as a result of losing their military status because of nonselection for promotion, we noted that the National Guard regulation on Selective Retention required the selection board in its decisionmaking process to consider qualification factors not entirely related to performance. We recognized then that the "selection-out" process may cause involuntary separation of an efficient and satisfactory employee through no fault of his own. We concluded that an employee so separated, if otherwise qualified, is entitled to severance pay.

Again in our decision 53 Comp. Gen. 493, 495 (1974) (B-172682, January 24, 1974), we stated that, when an application for reenlistment is rejected, the resulting termination of civilian employment is an involuntary separation. We, therefore, concluded as follows:

> Consequently, except when it is reasonably established that the reason for failure to accept an application for reenlistment is for cause based on charges of misconduct, delinquency or inefficiency, on the part of the enlisted member, it is our view that the automatic separation from the civilian position would entitle the technician to severance pay.

In response to that decision, paragraph 7-4f of the National Guard Bureau's Technician Personnel Supplement to the Federal Personnel Manual, Chapter 550-7 (November 1, 1975), was promulgated, stating:

> *Failure to accept reenlistment.* The failure to accept an enlisted technician's reenlistment application is an involuntary separation for severance pay purposes except when it can be reasonably established that failure to accept an application is for reason of misconduct, delinquency or inefficiency.

In Mr. Kawcak's case, the New Mexico Air National Guard determined to deny reenlistment, which carried with it subsequent removal as a technician, on the basis of an affirmative finding of delinquency. The New Mexico Air National Guard, however, does not dispute the sincerity of Mr. Kawcak's religious beliefs respecting the Sabbath. In fact, the district court was "convinced of the sincerity of Plaintiff's beliefs and his desire to observe his religion." That being the case, we cannot agree with the NMANG's determi-

nation that Mr. Kawcak was delinquent in refusing to attend Saturday drills for religious reasons.

In 12 Comp. Gen. 472, 474 (1932), we stated that the terms "delinquency" and "misconduct" were used synonymously in a provision of the civil service retirement act dealing with involuntary separations (now 5 U.S.C. § 8336(d)). In our opinion, Mr. Kawcak, in exercising his First Amendment rights to freely exercise his religion, cannot be found to have been guilty of misconduct or delinquency under the severance pay statute, 5 U.S.C. § 5595(b)(2) (1976). The free exercise of one's religious beliefs is a fundamental right guaranteed by the United States Constitution and the freedom to practice those beliefs has traditionally been one of the highest values of our society. See *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946); and *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943).

In the closely analogous area of unemployment compensation benefits, the Supreme Court has followed these precepts. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the State of South Carolina had denied unemployment compensation to a member of the Seventh Day Adventist Church who was fired for refusing to work on Saturday. The State statute provided for disqualification for benefits upon a finding of discharge for misconduct, and the State Supreme Court held that appellant's ineligibility for benefits did not infringe her constitutional liberties.

The United States Supreme Court reversed the State court, stating as follows, at page 404:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

The Court's holding was that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." 374 U.S. at 410. See also *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981).

We fail to see any significant difference between unemployment compensation and severance pay for the purposes of protecting the constitutional right of religious freedom. The eligibility standards, while not identical, are similar in nature and both are designed to cushion the impact of losing a job. As a remedial statute, 5 U.S.C. § 5595 is to be given a liberal construction to carry out its purposes. *Spring* v. *United States*, 492 F.2d 1053, 1054-55 (4th Cir. 1974). We also note that the State of New Mexico found Mr. Kawcak to be entitled to unemployment compensation under the New Mexico statutory provision disqualifying persons who leave their employment voluntarily without good cause. N.M. Stat. Ann. § 51-1-7A.

Accordingly, we hold that Mr. Kawcak's separation from his civilian technician position was involuntary and was not for misconduct, delinquency or inefficiency. Therefore, he is entitled to be paid severance pay under 5 U.S.C. § 5595 (1976).

[B-210305]

Officers and Employees—Transfers—Temporary Quarters—Subsistence Expenses—Entitlement—Delays en Route to New Station

Employee who performed travel incident to transfer of duty station was delayed by breakdown of mobile home in which he and his family were traveling. On basis of such delay, he claimed temporary quarters expenses for a 6-day period during which the mobile home was being repaired. Temporary quarters expenses may not be paid since, for the period of actual travel en route to the new station, the employee's rights are limited by 5 U.S.C. 5724a to an appropriate per diem allowance rather than temporary quarters expenses.

Subsistence—Per Diem—Transferred Employees—Delays

Employee's entitlement to travel expenses en route to new station is generally limited to per diem for number of days authorized for travel. However, when employee is delayed en route for reasons acceptable to agency, per diem may be allowed for period of delay. Since employee here was delayed by breakdown of his mobile home residence, he would have had to occupy temporary quarters, pending completion of repairs, even if he had proceeded directly to his new station. Under these circumstances, employee's per diem expenses may be allowed.

Matter of: Robert T. Bolton—Subsistence expenses incident to transfer, August 24, 1983:

The question presented is whether an employee who was delayed en route to his new duty station by the breakdown of his mobile home is entitled to temporary quarters expenses for the period of the delay. We hold that the employee may not be reimbursed for temporary quarters expenses since, for actual travel en route to a new duty station, an employee's rights are limited to an appropriate per diem allowance rather than temporary quarters expenses. However, where the agency determines that an employee was delayed en route for reasons beyond his control or otherwise acceptable to the agency, the employee may be reimbursed for per diem expenses for the period of the delay en route. Since the employee in this case was delayed by the breakdown of the mobile home in which he and his family reside, they would have had to occupy temporary quarters, pending completion of repairs on the mobile home, even if they had proceeded directly to the new duty station. Under these circumstances, we believe that per diem expenses may be paid for the period of the delay en route.

This decision is in response to a request from Mr. Ronald L. Carter, an authorized certifying officer with the Department of the Interior in Billings, Montana, concerning the claim of Mr. Robert T. Bolton for temporary quarters expenses incident to his transfer.

Mr. Bolton, an employee of the Bureau of Reclamation, Department of the Interior, was transferred in October 1982 from Pierre, South Dakota, to Hill City, South Dakota, a distance of approximately 194 miles. In connection with this transfer, Mr. Bolton was authorized to move his family, household goods, and mobile home from Pierre to Hill City. The official transfer date was set for October 10, 1982.

Mr. Bolton initially had planned to move his mobile home from Pierre to Hill City in just 1 day, and to have it ready for occupancy in Hill City on the same night. As a result, Mr. Bolton did not request temporary quarters expenses in connection with his transfer, and such expenses therefore were not authorized prior to the date set for his move. Despite the fact that subsistence expenses were neither requested nor authorized in this case, the certifying officer states that such expenses would have been authorized had they been requested.

Mr. Bolton was authorized certain travel expenses in connection with his transfer, including:

> * * * allowances for per diem * * *, certain expenses incurred in connection with real estate transactions and unexpired leases, or transportation of a house trailer for use as a residence and certain miscellaneous expenses.

The time set for the employee's travel, which governs the accompanying per diem allowance for expenses en route, was presumably not to exceed 1 day, given the relative proximity of the old and new duty stations.

The Boltons left Pierre on October 7, 1982. During the journey from Pierre to Hill City, however, the mobile home broke down, in or near Rapid City, South Dakota. Because the mobile home apparently could not be fixed promptly, the family found temporary lodging in Rapid City, and remained there for a period of 6 days. When the repairs on the mobile home were completed, the Boltons left Rapid City for their planned destination, arriving at Hill City on October 14, 1982, at approximately 10:30 a.m.

Mr. Bolton now claims temporary quarters expenses for the period from October 7, 1982, to October 14, 1982, in connection with his transfer. The agency questions the propriety of paying this claim since Mr. Bolton did not request, and was not authorized, temporary quarters expenses prior to the date of his transfer. The agency specifically has asked our Office whether authorization of temporary quarters expenses may be made retroactively, where the agency's initial nonauthorization of temporary quarters expenses did not result from an error or inadvertent omission in the preparation of the employee's travel orders.

The payment of travel, transportation, and relocation expenses of transferred Government employees is authorized under 5 U.S.C. §§ 5724 and 5724a (1976) as implemented by the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR). Section 5724 and section 5724a of Title 5, United States Code, authorize the reim-

bursement of all or part of certain expenses incurred by an employee who is transferred in the interest of the Government. Among the expenses authorized to be paid are per diem while en route and temporary quarters subsistence expenses of the employee and his immediate family for a period of 30 days.

In connection with 5 U.S.C. § 5724a, section 2-2.2b of the FTR provides in part:

Per diem allowance when en route between employee's old and new official stations. When an employee is transferred, an allowance shall be paid for per diem instead of subsistence expenses incurred by the employee's immediate family while traveling between the old and new official stations regardless of where the old and new stations are located. If the actual travel involves departure and/or destination points other than the old or new official station, the per diem allowance shall not exceed the amount to which members of the immediate family would have been entitled if they had traveled by usually traveled route between the old and new official stations. * * *

Thus, under FTR section 2-2.2b, above, for the period of actual travel en route to the new duty station, an employee's right to reimbursement of expenses is specifically limited to an authorized per diem allowance rather than temporary quarters expenses. In this regard, en route travel is generally defined as the period beginning when the employee leaves the old station and ending when he arrives at the new station. Whatever temporary quarters and subsistence expenses are incurred while the employee is en route are covered by an appropriate per diem allowance and not by temporary quarters subsistence expenses.

In this regard, section 2-2.3d(2) of the FTR, as amended in 1977, provides as follows for the maximum per diem allowance when the employee uses a privately owned vehicle:

(2) *Maximum allowance based on total distance.* Per diem allowances should be paid on the basis of actual time used to complete the trip, but the allowances may not exceed an amount computed on the basis of a minimum driving distance per day which is prescribed as reasonable by the authorizing official and is not less than an average of 300 miles per calendar day. *An exception to the daily minimum driving distance may be made by the agency concerned when travel between the old and new official stations is delayed for reasons clearly beyond the control of the travelers such as acts of God, restrictions by Governmental authorities, or other reasons acceptable to the agency;* e.g., a physically handicapped employee. In such cases, per diem may be allowed for the period of the delay or for a shorter period as determined by the agency. The traveler must provide a statement on his/her reimbursement voucher fully explaining the circumstances which necessitated the en route travel delay. The exception to the daily minimum driving distance requires the approval of the agency's authorizing official. [Italic supplied.]

The above provision prior to 1977 did not specifically provide that agencies could make an exception to the daily minimum driving distance requirement when an employee was delayed en route for reasons beyond his control or acceptable to the agency. Our Office has not yet interpreted the current provision in light of the language which was added in the 1977 amendment allowing agencies to make exceptions. Prior to that amendment, we interpreted the provision as requiring the employee to travel a specified distance each day, that is, an average of 300 miles (or a higher daily mileage rate prescribed by the authorizing official) per calendar

day. Since the regulation at that time did not contemplate exceptions to the daily minimum distance requirement, we held in *Leroy A. Ellerbrock,* B-190149, December 23, 1977, that the regulation did not permit the payment of an increased per diem allowance due to extenuating personal circumstances such as the breakdown of an employee's rental truck en route to the new station. As amended, however, section 2-2.3d(2) of the FTR clearly provides that agencies may make exceptions to the daily minimum driving distance and, therefore, allow additional per diem, when an employee is delayed en route to his new station for reasons beyond his control or otherwise acceptable to the agency. Accordingly, *Ellerbrock* will no longer be followed where the effective date of the transfer is on or after June 1, 1977.

In this case, Mr. Bolton is not entitled to temporary quarters expenses in connection with his 6-day delay and stopover in Rapid City, since he incurred the stated expenses en route to his new duty station of Hill City. There is no evidence in the record that Mr. Bolton occupied temporary quarters before he began his travel or following arrival at his destination. He occupied temporary quarters only during the period he was en route to Hill City, because of the delay resulting from the breakdown of his mobile home. Even if the agency had authorized temporary quarters expenses for Mr. Bolton prior to his transfer, Mr. Bolton would not have been able to use such expenses to cover his en route travel, since his entitlement to reimbursement for such travel would have been limited under 5 U.S.C. 5724a to an appropriate per diem allowance. The certifying officer's question concerning authorization of temporary quarters is answered accordingly.

Although Mr. Bolton is not entitled to temporary quarters expenses, the agency may provide him with a per diem allowance for the period of his delay en route to the new station, pursuant to section 2-2.3d(2) of the FTR. If the agency determines that Mr. Bolton was delayed for reasons which were beyond his control, or are otherwise acceptable to the agency, additional per diem may be allowed to cover the period of delay. There is no evidence in the record to show that Mr. Bolton was responsible for, or had any control over, the breakdown of his mobile home, which resulted in the 6-day delay. Furthermore, since the vehicle which broke down was the actual residence in which Mr. Bolton and his family were living, the family would have been required to occupy temporary quarters while the mobile home was being repaired, whether they had remained in Rapid City or proceeded directly to Mr. Bolton's new station. Under these circumstances, we believe that per diem expenses may be paid for the period of the delay en route.

Accordingly, while there is no legal basis upon which Mr. Bolton may be reimbursed for temporary quarters expenses in connection with his stay in Rapid City, he may be paid per diem expenses for the period of his delay en route to his new duty station.

[B-212221]

Contracts—Privity—Subcontractors—Default of Prime Contractor—Government Liability

Subcontractors and suppliers, claiming amounts due for labor and materials furnished to defaulted prime contractor, may not bring a claim directly against the Government when, under any common law theory, they lack privity of contract with the Government.

Contracts—Contract Disputes Act of 1978—Inapplicability—Subcontractor Claims

Under the Contract Disputes Act of 1978, contracting officer does not have authority to settle claims of subcontractors who were not parties to prime contract, even when such firms agree to accept *pro rata* settlement from remaining contract funds. Rather, such funds should not be paid until a trustee in bankruptcy and/or court of competent jurisdiction settles accounts among all potential claimants and prime contractor.

Matter of: General Services Administration—Request for Advance Decision, August 24, 1983:

The General Services Administration (GSA) requests an advance decision regarding the authority of a contracting officer to settle claims of two subcontractors from contract funds remaining after termination for default of a prime contract. We conclude that the subcontractors have no legal basis for recovery from the Government, and the contracting officer has no authority to settle at this time.

On August 24, 1981, GSA awarded a $24,975 contract for handicap alterations to the Federal Building and U.S. Post Office, Tupelo, Mississippi, to C.G. Construction Company. A $500 change order brought the total contract price to $25,475. Since the amount of the original award had been less than $25,000, GSA did not require payment and performance bonds. The agency paid C.G. Construction a total of $9,171 in progress payments before the firm abandoned the project and apparently went out of business. Consequently, the contracting officer terminated the contract for default on April 5, 1982.

On May 14, 1982, GSA awarded a completion contract in the amount of $5,000 to Creative Glass Company, a subcontractor on the project. After all the work had been completed, a balance of $11,304 still remained in the account.

Because C.G. Construction did not submit payrolls as required by the contract, GSA has no record of claims for labor or materials furnished by subcontractors or suppliers, except for those on which it seeks our opinion: a claim by Creative Glass, which on March 23, 1983, advised the contracting officer that it was owed $14,856.80 for labor and materials, and a claim by Senter Transit Mix for $716.10. Both firms have agreed to accept *pro rata* settlements of their claims from the funds remaining in the contract account and to hold the Government harmless for any additional amounts due.

Before settling a claim, a contracting officer must determine whether there is a sufficient legal basis for recovery from the Government. It is well settled that since privity of contract generally

does not exist between the Government and subcontractors, such firms have no legally permissible way to bring claims directly against the Government. See *Curtis Jepson, trading as Curt's Plumbing and Heating,* B-194773, May 24, 1979, 79-1 CPD 376; 23 Comp. Gen. 655 (1944). Privity may be found in certain situations, however, under recognized common law theories of agency, third party beneficiary, or implied contract. See *Universal Aircraft Parts, Inc.,* B-187806, January 11, 1979, 79-1 CPD 14.

In this case, none of the above theories applies. We find no suggestion of a contractual relationship, express or implied, between the subcontractors/suppliers and the Government during the period before the prime contractor's default. Nor do we find that C.G. Construction's was acting "by and for" GSA, or that the claimants are third party beneficiaries of C.G. Construction's contract with GSA, since there is no evidence that the contracting parties, *i.e.,* C.G. Construction and GSA, had the interest of the claimants in mind when they entered into the contract. See *Universal Aircraft Parts, Inc., supra.* Therefore, we find no legal basis for a direct claim against GSA.

GSA asks whether, under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601(4), 605 (Supp. IV 1980), the contracting officer has authority to decide the claims. Although the Act does not categorically exclude all subcontractors and third parties from proceeding under it, see *A&B Foundry, Inc.,* EBCA No. 118-4-80, May 29, 1981, 81-1 BCA ¶ 15,161, the boards of contract appeals repeatedly have held that absent privity, or specific contractual provisions or agency regulations providing for direct appeal, subcontractors and suppliers have no right to recover for unpaid labor and materials furnished to the prime contractor. Enactment of the Contract Disputes Act did not alter this requirement. *Id.; J.M.C. Mechanical, Inc.,* ASBCA No. 26750, June 17, 1982, 82-2 BCA ¶ 15,878, and cases cited therein.

The subcontractors and suppliers in this case thus have no legal claim against GSA. While in certain circumstances, a prime contractor itself can pursue retained funds or authorize subcontractors to do so in its name, see *Divide Constructors, Inc., Subcontractors to Granite Construction Company,* IBCA No. 1134-12-76, March 29, 1977, 77-1 BCA ¶ 12,430, it appears from the record that the principals of this prime contractor cannot be located. Also, GSA's submission to our Office suggests that the prime's failure to submit required payrolls has precluded the Government from determining whether there are other suppliers, or workers, who might be due payment. Consequently, we think it would be premature for the Government to dispose of the funds in issue until a trustee in bankruptcy and/or a court of competent jurisdiction settles accounts among these two firms and other potential claimants. *Cf. Merritt* v. *United States,* 267 U.S. 338 (1925) (subcontractor may not recover fill contract price from the Government); B-147131, March 2, 1962 (subcontractor's claim denied pending final determination by proper judicial authority).

[B-211243]

Subsistence—Per Diem—Temporary Duty—Lodging in Rental Property Owned

An employee who uses his mobile home for lodging while on temporary duty may not include $600 rental payment allegedly made to himself in computing the lodgings portion of his per diem allowance even though he claims that the mobile home is held for rental purposes. If the employee submits documentation to establish that the property is held and used as a rental unit and would otherwise have been rented out during period of his claim, allocable interest and taxes incurred, if any, may be included in determining lodging costs.

Subsistence—Per Diem—Rates—Lodging Costs—Leased Television With Option to Purchase

Absent evidence that the claimant terminated a television lease agreement with option to purchase at end of temporary duty assignment he may not include cost of renting the television in the computation of the lodgings portion of his per diem allowance. Payments on personal property for the purpose of eventual ownership are not within the purview of lodging costs recognized as reimbursable.

Matter of: Lucius Grant, Jr., August 25, 1983:

Mr. Lucius Grant, Jr. requests reconsideration for our Claims Group's February 28, 1983 denial of his claim for additional per diem. We find that his claim must be disallowed on the basis of the record presented.

Mr. Grant's permanent duty station is Robins Air Force Base, Georgia. He reported for temporary duty at Charleston Air Force Base, South Carolina, on August 10, 1981. He obtained lodging in a local motel during the period August 10 through September 10, when he moved his mobile home from land he owns in Georgetown, South Carolina, to rented space at a North Charleston address. Mr. Grant occupied these quarters until his temporary duty was completed on December 18, 1981. He was paid per diem at the rate of $33 a day for the period of his temporary duty assignment. The lodgings portion of his per diem allowance was computed on the basis of his motel costs and costs associated with the occupancy of his mobile home, including water, electricity, cable television, telephone and rental space for the mobile home. The $1,890 amount he claimed as paid to himself for use of the mobile home was excluded from the computation of lodgings costs, as was $168.88 in rental payments made on a combination television/stereo set under a lease/purchase agreement. Mr. Grant appeals from our Claims Group's determination that the Air Force correctly excluded these items of expense in determining the lodgings portions of his per diem allowance.

It is Mr. Grant's contention that the excluded items of expense should be considered lodging costs under the following language of paragraph C4552-2j of Volume 2 of the Joint Travel Regulations (2 JTR):

j. *Allowable Expenses When an Apartment, House, Mobile Home, Travel Trailer, or Recreational Vehicle is Rented or Used for Quarters While on TDY.* When an em-

ployee on temporary duty rents a furnished or unfurnished apartment, house, mobile home, travel trailer, or camping vehicle for use as quarters, or uses a privately owned mobile home, travel trailer, or recreational vehicle for quarters, per diem will be computed in accordance with the provisions of subpar. a. Allowable expenses which may be considered as a part of the lodging cost for averaging purposes are as follows (50 Comp. Gen. 647 and 52 Comp. Gen. 730);

1. rent of the apartment, house, mobile home, travel trailer, or camping vehicle;
2. rental charge for parking space for a mobile home, travel trailer, or camping vehicle * * *

That regulation is not authority to pay an employee a per diem allowance to recover his expenses of ownership by means of a payment in the nature of rent when he occupies his privately owned motor home or travel trailer while on temporary duty. In *Matter of Witherspoon,* B-189392, August 23, 1977, we specifically held that an employee who lodges in a private recreational vehicle at a temporary duty station may not be reimbursed for expenses of the vehicle's upkeep and maintenance, including depreciation. However, he may be reimbursed for expenses incurred including propane for heating, rental of the site on which trailer was placed, and the cost of utilities. Similarly, we held in *Matter of Stertz,* B-196968, July 1, 1980, that a military member who uses a personal recreation vehicle for lodging while on temporary duty may not be reimbursed the portion of the monthly purchase payment on his recreational vehicle for the time in temporary duty status. Reimbursement of lodging expenses is to compensate a member for additional expenses he incurs while away from the permanent station. In contrast, rental expenses actually incurred for the use of a mobile home or travel trailer may be included as a cost of lodging. *Matter of McDonald,* B-199462, August 12, 1981.

In support of his claim, Mr. Grant has submitted receipts for payments of $600 per month made to himself for rent of the mobile home to which he holds title. He states that he does not ordinarily reside in the mobile home but holds it as a rental property. In *Matter of Gardner,* B-210755, May 16, 1983, we considered a per diem claim submitted by an employee who, while on temporary duty, lodged in a camp which he owned and claimed to hold as a rental property. In denying his claim for lodging costs based on the rental price of the property, we held that an employee who claims expenses on account of having lodged in property which he owns must provide clear and convincing evidence that but for his lodging there while on temporary duty, the property would have been rented out at all times covered by the claim. Noting that the per diem allowance was not intended to reimburse an employee for allegedly lost income, we stated:

* * * If, however, he provides the Corps of Engineers with records showing that the property is held and used as a rental property and would have been rented during the entire period, his claim for lodging expenses occasioned by his temporary assignment may be considered for payment. However, the basis for computing these costs is not the rental price of the property, but rather a proration of his monthly interest, taxes, and utilities * * * for the rental property in question.

The principles set forth in *Matter of Gardner* would appear to apply equally to the situation in which an employee, while on tem-

porary duty, lodges in a mobile home he holds as a rental property. Thus, a rental cost of $600 per month may not be included for purposes of determining the lodgings portion of Mr. Grant's per diem allowance.

The lodgings portion of the per diem allowance already paid to Mr. Grant covers the utility costs he incurred while occupying the mobile home. He is entitled to these costs regardless of its status as a rental property. However, additional amounts for interest and taxes incurred, if any, may not be included in the lodgings costs computation since Mr. Grant has not furnished any documentation to substantiate his contention that the mobile home was in fact rental property or to establish that it would otherwise have been rented out during the period covered by his claim.

In 52 Comp. Gen. 730 (1973) we recognized that the cost of renting a television may be considered a lodging cost incident to the rental of an apartment. In this case, Mr. Grant rented the television/stereo unit under an 18-month lease with an option to purchase. In the absence of evidence to establish that the lease/purchase agreement was terminated at the end of this temporary duty assignment, the rental payments may not be included as a lodging cost since there is no authority to include payments made on items of personal property for the purpose of eventual ownership.

Accordingly, the Claims Group's settlement is sustained.

[B-206127.3]

Contracts—Awards—Abeyance—Resolution of Protest

There is no requirement that an agency make an award while a protest is pending before General Accounting Office even though delay in awarding the contract results in an urgent situation requiring that the solicitation be canceled and a portion of the requirement resolicited.

Contracts—Small Business Concerns—Awards—Size Status—Time to Question

The contracting officer has the right to question a bidder's status as a small business at any time during the award process.

Matter of: Charles Beseler Company, August 29, 1983:

Charles Beseler Company protests the cancellation of invitation for bids (IFB) DAAB07-82-B-E033 by the U.S. Army Communications-Electronics Command (CECOM), Ft. Monmouth, New Jersey. It also claims reimbursement of its bid preparation costs.

The protester essentially contends that award should have been made to it well before the decision to cancel was made, and that the contracting officer was arbitrary and capricious in not so awarding the contract. We find no legal basis for the protester's position and therefore we deny the protest and the claim.

The solicitation, which was set aside for small business, called for 1,522 driver's viewers, which were to be provided as Government Furnished Material to manufacturers of tanks for the Army and U.S. Marine Corps. The solicitation sought prices with and without

first article testing and provided for delivery to begin 300 days after award. It also provided the Government the option to increase the quantity up to 100 percent of the base quantity. Seven bids were opened on March 24, 1982. The lowest five bidders were as follows: Numax Electronics Incorporated at $2,614,620, Baird Corporation at $2,646,036, Beseler at $2,844,618, ICSD Corporation at $2,917,529, and Opto Mechanik, Inc. at $3,361,208. These prices all include first article testing. Baird was the only bidder eligible for waiver of first article testing and it bid the same price with or without such testing.

Subsequently, four of the five low bidders filed at least one protest regarding the award of this contract with either the contracting agency or our Office. First, Baird and Beseler, by letters of March 26 and 29, respectively, protested to CECOM that the bid submitted by Numax was nonresponsive because Numax failed to price the option quantities in accordance with the solicitation instructions. By another letter of March 29 to CECOM, Beseler also protested Baird's eligibility for award, contending that the firm was other than a small business. On April 13, CECOM sustained the protests against award to Numax and rejected Numax' bid. Numax subsequently filed a protest with our Office against the rejection of its bid. In October, we denied the protest. See *Numax Electronics Incorporated,* B-206127.2, October 8, 1982, 82-2 CPD 317. On April 29, the Small Business Administration (SBA) advised CECOM that Baird was not a small business and therefore ineligible for award. This determination, coupled with CECOM's rejection of Numax' bid, made Beseler potentially the low bidder and the contracting officer consequently in early May requested that a preaward survey of Beseler be conducted. The completed survey did not reach the contracting office until July 9.

Baird protested to the agency by letter of May 11 that Beseler was not responsible and not small. SBA, by letter of June 7, determined Beseler to be small. On July 2 Opto Mechanik protested Beseler's responsibility to CECOM and on July 14 Opto Mechanik challenged Beseler's status as a small business.[1] After we issued our decision denying the Numax protest, the contracting officer, in response to the Opto Mechanik protest, again referred the question of Beseler's size status to SBA. By letter of November 5, the SBA affirmed its prior determination that Beseler was small.

Meanwhile, CECOM learned that the delay in award was jeopardizing the tank delivery schedules. On June 8, the Marine Corps advised CECOM that it required its first delivery of viewers by August 1983, and that in light of the solicitation's 300-day delivery schedule, delivery probably would not occur in time to be coordinated with its tank production schedule. On July 29, the Army Tank-Automotive Command (TACOM) advised CECOM that it re-

[1] ICSD by letter dated July 7, 1982 to our Office complained that no award should be made to Beseler. Since, however, ICSD's letter was sent in response to CECOM's report in connection with Numax' protest filed with our Office we do not consider it a separate protest.

quired its first delivery of viewers in January 1983, and it later informed CECOM that delivery to it after that date would require shutting down tank production lines at a daily cost of $50,000. In view of the urgency, CECOM decided that the Army's initial requirements could only be met by a firm for which first article testing could be waived. Since none of the bidders considered by the SBA to be small under the solicitation qualified for waiver of first article testing, CECOM in late September requested permission to cancel the solicitation, resolicit the most urgent portion of the requirement from the only two firms, both large, for which first article testing could be waived, and later resolicit the remainder under a solicitation set aside for small business. The SBA concurred, permission was obtained, and the solicitation was canceled on October 26.

Beseler does not challenge the urgency of the situation that led to the cancellation. Rather, Beseler asserts that because of the urgency the contracting officer should have awarded a contract while the protests were pending. Beseler points out that the contracting officer's failure to make the award and the subsequent cancellation resulted in the termination of "a significant portion of a small business set-aside."

The Army reports that the contracting officer did not appreciate the urgent need for the viewers until late July. At that time, the record indicates, efforts were made to satisfy the most urgent requirements through other contract sources. This effort was successful for the Marine Corps requirement, but not for the Army's own requirement. The contracting officer reports that she requested permission to cancel the solicitation when it became apparent that the Army's urgent requirements could no longer be met under the outstanding IFB.

We do not believe the protester has established that the contracting officer's actions were arbitrary or capricious or otherwise improper. Although it is not clear to us why the contracting officer did not appreciate the urgency of the procurement—the IFB itself, in a provision captioned "URGENCY OF DELIVERY," warned bidders that the delivery schedules "are firm" and that no extensions would be considered—there is absolutely no requirement that an award *must* be made while a protest is pending. The regulation relied on by the protester, Defense Acquisition Regulation (DAR) § 2-407.8(b), authorizes award of a contract prior to resolution of a protest filed with this Office if, among other reasons, the items being procured are urgently required and approval is received from the appropriate level above the contracting officer. It does not, however, mandate the use of such authority, and it is clear from reading the regulatory provision in its entirety that award prior to protest resolution should be made only in exceptional cases. In other words, the decision to seek approval for award while a protest is pending is within the discretion of the contracting officer, and no bidder has the right to insist that an award be made pursuant to the authority in DAR § 2-407.8.

Moreover, even if the contracting officer wanted to make an immediate award, the record indicates that in light of the various protests it was not clear to her which bidder in fact should have been viewed as in line for award. While Beseler insists it was in line for award after the SBA first ruled that it was a small business and after the preaward survey was completed in July, the Numax protest was still pending (had it been sustained, Numax would have been in line for the award), and Beseler's size status had again been called into question. Although Beseler points out that Opto Mechanik's July 14 protest challenging Beseler's size status was untimely under DAR § 1-703(b)(1), the contracting officer had the authority to question Beseler's size status on her own in light of the information supplied by Opto Mechanik. *See* DAR § 1-703(b)(2). In this regard, the contracting officer points out that the original size determination on Beseler did not encompass consideration of all the firms alleged by Opto Mechanik to be affiliates of Beseler; she further states that she wanted to be certain that Beseler indeed was a small business so that the purposes of the Small Business Act would be furthered.

The contracting officer does not explicitly indicate why, in light of this concern, she did not again refer the question of Beseler's size status to SBA until October. We note, however, that it was about this time when she became concerned about the urgency aspects of the procurement and became involved in the effort to have the most urgent requirements satisfied through other sources. Also, as the contracting officer further points out, once the urgency became apparent to her and the corollary efforts were to no avail, she realized that the Army's needs could not be met by an award under this IFB and she initiated action to have the IFB canceled. Thus, although the referral to SBA was eventually made, presumably to provide for the possibility that authority to cancel the IFB would not be forthcoming, it is clear from this record that the contracting officer was not prepared to make an award to Beseler in July or August because 1) the contracting officer had some doubt as to Beseler's small business status, and 2) she believed that award under the IFB would not meet the Army's needs unless other arrangements could be made to meet certain urgent requirements.

These circumstances suggest no arbitrary or capricious action, but rather action that is within the permissible bounds of contracting officer discretion. While another contracting officer might have handled the procurement differently, that does not render this contracting officer's actions improper. In short, the protest falls short of establishing the existence of action to which we can interpose legal objection.

The protest and claim are denied.

[B-209721]

Property—Private—Damage, Loss, etc.—Personal Property—Claims Act of 1964—Settlement Authority

The concept of administrative discretion does not permit an agency to refuse to consider all claims submitted to it under the Military Personnel and Civilian Employees' Claims Act, which authorizes agencies to settle claims of Government employees for loss or damage to personal property. While General Accounting Office will not tell another agency precisely how to exercise its discretion, that agency has a duty to actually exercise it, either by the issuance of regulations or by case-by-case adjudication.

Matter of: Scope of discretion under 31 U.S.C. 3721, September 2, 1983:

The Federal Mediation and Conciliation Service has asked our opinion regarding whether it has discretion to refuse to consider all claims filed by its employees under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended (the Act).[1] Based on the reasoning herein, we conclude that the concept of administrative discretion does not permit an agency to adopt a policy of refusing all claims submitted to it under the Act.

BACKGROUND

The Military Personnel and Civilian Employees' Claims Act of 1964 authorizes agencies to settle claims of Government employees for loss or damage to personal property. It states in part as follows:

> The head of an agency may settle and pay not more than $25,000 for a claim against the Government made by a member of the uniformed services under the jurisdiction of the agency or by an officer or employee of the agency for damage to, or loss of, personal property incident to service. A claim allowed under this subsection may be paid in money or the personal property replaced in kind. 31 U.S.C. § 3721(b).

A claim, to be cognizable under the Act, must be by a member of the uniform services or a civilian officer or employee and must be for damage or loss to personal, not real, property. The loss or damage must be "incident to service," and the agency should be satisfied with the degree of evidence submitted by the claimant before allowing the claim. The agency also must determine that possession of the property was reasonable or useful under the circumstances. If the loss or damage occurred in quarters occupied by the claimant within the 50 states or the District of Columbia, a claim is cognizable only if the quarters were assigned or otherwise provided in kind by the United States. Negligence on the part of the claimant, his agent, or his employee will preclude an award under the Act. The maximum settlement authority is $25,000. Finally, the statute of limitations is 2 years after accrual, although this may be tolled during time of war or armed conflict.

Most claims under the Act involve loss or damage suffered in the shipment of personal property in connection with a change of duty

[1] 31 U.S.C. § 3721 (formerly 31 U.S.C. § 240–243, recodified by Pub. L. No. 97-258, September 13, 1982, and Pub. L. No. 97-452, January 12, 1983).

station. See B-155619, January 18, 1965. Loss or damage to property incident to authorized nontemporary storage is also cognizable (see 44 Comp. Gen. 290, 292 (1964); B-178243, May 1, 1973), as is loss or damage to a privately owned motor vehicle while used for official business (see B-185513, March 24, 1976; B-174669, February 8, 1972).

The definition of "settlement" under the Act includes full or partial allowance or disallowance. 31 U.S.C. § 3721(a)(3). The agency's decision regarding settlement of the claim is final and conclusive. 31 U.S.C. § 3721(k). The Act does not contemplate judicial review.[2] GAO does not have jurisdiction to settle a claim against another agency or to question another agency's settlement as long as it was made in accordance with the statutory criteria and applicable regulations. *See* 47 Comp. Gen. 316 (1967).

The Act authorizes the President to prescribe uniform policies to implement the statute with respect to the civilian agencies. 31 U.S.C. § 3721(j). This authority has not been exercised, however. Each department and agency must therefore determine its own policies subject to the statutory criteria. In a 1961 decision, we said that payment under the Act "is not a matter of right but of grace resting in administrative discretion." B-144926, February 23, 1961. Noting this statement in our *Principles of Federal Appropriations Law* (1st ed., June 1982), the Federal Mediation and Conciliation Service questions the limits of its discretion. The specific issue is whether an agency can adopt a policy of refusing to consider all claims under the Act.

Analysis

The purpose of agency regulations is to support the intent of the enabling legislation. See *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U.S. 129, 134 (1936); *Dixon* v. *United States,* 381 U.S. 68, 74 (1965).

As a general rule, a statute should be construed according to its subject matter and the purpose for which it was enacted. Sutherland, Statutory Construction, section 58.06, at 474 (4th ed. 1973). The legislative history of the Military Personnel and Civilian Employees' Claims Act shows a clear purpose of allowing all Government employees the opportunity to present a claim for loss or damage to personal property.

The origin of 31 U.S.C. § 3721 was the Military Personnel Claims Act of 1945, 59 Stat. 225, applicable to military personnel and civilian employees of the military departments. The authority was extended to civilian agencies as well with passage of the Military Personnel and Civilian Employees' Claims Act in 1964 (78 Stat. 767). The Committee on the Judiciary of the House of Representatives

[2] *Macomber* v. *United States,* 335 F. Supp. 197 (D.R.I. 1971). Several other courts have reached the same result under other "final and conclusive" statutes. See also *Work* v. *Rives,* 267 U.S. 175 (1925), discussed in text, *supra; United States* v. *Babcock,* 250 U.S. 328 (1919).

stated that enactment "would extend equivalent authority to all Government agencies so that all employees of the Government and military personnel would be entitled to assert such claims." H.R. Rep. No. 460, 88th Cong., 1st Sess. 2 (1963).

In an amendment to the Act, Pub. L. No. 89-185, the Committee further discussed its purposes, as follows:

> This committee has repeatedly recognized that the United States owes a moral duty to compensate individuals who have suffered such heavy personal losses, because of their service to the Government. * * * [T]he introduction of private relief bills has served to focus attention on the fact that there is a serious lack in the existing law to cope with these losses.
>
> [I]t has seemed that there is a lack of understanding of the responsibility of the United States regarding the losses which give rise to claims cognizable under the statutes referred to in this bill. * * * It is only just that the Government assume this responsibility of paying for losses while the property is being sent under Government contract to a new place of duty. H.R. Rep. No. 382, 89th Cong., 1st Sess. 5 (1965).

Additional discussion of the intent of the Act is found in the legislative history of Pub. L. 97-226, which increased the ceiling payable on claims from $15,000 to $25,000. The report of the Senate Judiciary Committee stresses the inequities of requiring "military personnel and civilian employees of the Government to risk losses of their property incident to their service without adequate protection." It further states "the Committee believes that it is important that Government personnel have a guarantee of reasonable recompense for losses suffered as a result of Government directed moves." S. Rep. No. 97-482, 97th Cong. 2d Sess. 3 (1982).

There is also evidence in the legislative history of the 1964 Act and subsequent amendments that one purpose of the Act was to reduce the need for Congress to consider private relief bills. *See, e.g.,* S. Rep. No. 1423, 88th Cong., 2d Sess. 6 (1964). Routine denial of all claims would thwart that purpose.

It seems clear from the foregoing that Congress did not contemplate that an agency simply refuse to consider all claims.

Clearly the intent of the Act and its various amendments was to broaden, not narrow, the coverage of Government employees. On its face, the Act is broadly written; an agency "*may* settle and pay a claim." [Italic supplied.] This language is discretionary, not mandatory. It does not create a legal entitlement. Certainly, as noted earlier, an agency has considerable discretion in implementing the Act. However, a blanket refusal to consider all claims is, in our opinion, not the exercise of discretion.

Our point is illustrated by the Supreme Court's decision in *Work* v. *Rives,* 267 U.S. 175 (1925). That case concerned a statute structurally very similar to the Military Personnel and Civilian Employees' Claims Act of 1964. The statute involved was section 5 of the Dent Act, 40, Stat. 1274, under which Congress authorized the Secretary of the Interior to compensate a class of people who incurred losses in furnishing supplies or services to the Government during war. The Secretary's determinations on particular claims were to

be final and conclusive. As is the Military Personnel and Civilian Employees' Claims Act of 1964, section 5 of the Dent Act "was a gratuity based on equitable and moral considerations" (267 U.S. at 181), vesting the Secretary with the ultimate power to determine which losses should be compensated.

The plaintiff in *Rives* had sought mandamus to compel the Secretary to consider and allow a claim for a specific loss, incurred as a result of the plaintiff's obtaining a release from a contract to buy land. The Secretary had previously denied this claim because he had interpreted the statute as not embracing money spent on real estate. The Supreme Court held that it could not compel the Secretary to take any further action; the Secretary had made a decision and had articulated reasons for it.

The case is relevant here in that the Court went on to cite, and distinguish, a line of cases in which "a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator [plaintiff] in such cases does not ask for a decision any particular way but only that it be made one way or the other." 267 U.S. at 184. Thus, the Court could not compel the Secretary to exercise his discretion to achieve a particular result, but the Secretary had in fact exercised that discretion.

The concept is further illustrated in *Rockbridge* v. *Lincoln*, 449 F.2d 567 (9th Cir 1971). There, Congress had delegated to Interior Department officials the discretion to determine the specific content of regulations pertaining to 25 U.S.C. §§ 261 and 262. In a class action by Indians to compel the adoption of regulations, the Ninth Circuit noted that the term "discretion" does not include the "unbridled discretion to refuse to regulate," but rather implies that the designated officials "shall exercise discretion in deciding what regulations to promulgate and in determining specific quantities, prices and kinds." 449 F.2d at 571.

Applying this concept to the Military Personnel and Civilian Employees' Claims Act of 1964, we do not think the administrative discretion conferred by Congress is satisfied by its non-exercise, that is, by the simple refusal to consider all claims.

It is generally recognized that administrative discretion may be exercised in either of two ways—the issuance of regulations or case-by-case adjudication. (The two are of course not mutually exclusive.) See generally 2 Davis, Administrative Law Treatise ch. 7 (2d ed. 1979); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202–203 (1947). Under the first approach, which seems to be the more common method of implementing the statute in question, an agency issues regulations defining the types of claims it will or will not consider, together with whatever other administrative requirements it wishes to impose. Under the second approach, the agency renders a decision on each claim, stating its reasons for allowance or disal-

lowance, and gradually builds a body of "regulations" through this process.

We do not purport to tell any agency which approach it must follow.[3] It seems to us, however, that either approach should include, at a minimum, the consideration of claims incident to changes of duty station. This was one of the major situations that prompted the original legislation, and it has been repeatedly emphasized in the legislative history of subsequent amendments. To exclude change-of-station claims would be clearly inconsistent with congressional intent. Beyond this, however, we recognize that there is considerable variation among agencies [4] and we would view it as inappropriate to comment on which types of otherwise cognizable claims another agency should or should not consider. We hold merely that an agency has the duty to actually exercise its discretion and that this duty is not satisfied by a policy of refusing to consider all claims.

[B-209938]

Contracts—Negotiation—Offers or Proposals—Best and Final—Additional Rounds—Auction Technique Not Indicated

Agency's requests for three best and final offers did not automatically establish an auction situation since the multiple best and final offers were required by the receipt of contingent offers and the agency's determination that several solicitation requirements, which were inhibiting the competition, were not essential to its minimum needs.

Contracts—Negotiation—Offers or Proposals—Evaluation—Discount Terms

Where a solicitation reserved to the agency the right to delay delivery without cost for a specified period of time, best and final offer which included a prompt delivery discount was properly evaluated without consideration of the discount since at that time delays in delivery appeared probable.

Contracts—Damages—Liquidated—Reduction of Amount—Reasonableness

Agency did not act unreasonably in substantially reducing the amount of liquidated damages that could be imposed where the agency could conclude that the original provision was unnecessary and, because it could have resulted in a potential risk exposure of 3.5 times the contract price, may have been unenforceable.

Matter of: CMI Corporation, September 2, 1983:

CMI Corporation protests the request for a third round of best and final offers by the United States Marine Corps under request for proposals (RFP) No. M00027-82-R-0030 and the subsequent award of a contract to IBM Corporation. The Marine Corps made its award after receipt and evaluation of the third best and final

[3] We recognize that 31 U.S.C. § 3721(j) now provides that "the head of each agency shall prescribe regulations to carry out this section." However, the mandatory "shall" was not used in the source provision—see 31 U.S.C. § 241 (1976)—and we construe the recodification in acordance with its stated intent of restating the law without substantive change.

[4] For example, agencies vary considerably on the extent to which they will consider claims for damage to privately owned motor vehicles used on official business.

offers. The RFP solicited offers to provide three systems of IBM computer equipment to be installed in mobile vans and deployed to provide mission support in combat environments. CMI contends the agency conducted an auction by repeatedly requesting subsequent rounds of best and final offers after revising the specifications to accommodate the conditions insisted upon by IBM so as to permit IBM's previously unresponsive proposals to become acceptable. CMI asserts these actions exhibit bias in favor of IBM and bad faith by the agency.

The protest is denied.

There are several RFP provisions at issue here, among them being the provision for liquidated damages, the delivery schedule, the requirement for certain manuals and certain maintenance provisions.

As originally conceived, the liquidated damages provision was to apply for late delivery of each component (about 26 in each system) as well as to each system itself, bringing potential liquidated damages to $14,000 per day or a potential expense in excess of three times the contract value. As discussed below, IBM took exception to this liability.

The solicitation also contained fixed delivery dates for each system. However, since systems 2 and 3 are to be delivered to a "van integration" contractor as Government Furnished Equipment, the solicitation contained a clause that permitted the Government to delay the delivery for these systems for a period of up to 120 days provided certain notice requirements were met. At the time of receipt of the third round of best and final offers, the "van integration" contract had not been awarded so that a delay in the need for the computer equipment was foreseeable.

Four firms responded to a synopsis for the requirement that appeared in the Commerce Business Daily, but only IBM and CMI submitted proposals on June 10, 1982. Each offered the required IBM equipment and each was found to be technically acceptable with respect to the hardware. Each proposal, however, contained exceptions, contingencies and requests for revisions. After discussions with each offeror, the specifications were amended in minor respects and the offerors were requested to submit best and final offers by August 20.

IBM's best and final offer contended that the solicitation provision imposing liquidated damages of $1,000 per day for late system delivery plus $500 per day for late delivery of each component or item of software was punitive because it could amount to $14,000 per day and reflected a potential risk exposure of 3.5 times the contract price, IBM asked that the liquidated damages be limited to a total of $1,000 per day. IBM also added a separate one time surcharge for accepting the $1,000 per day liquidated damage provision, and additional surcharges to cover its potential liability arising from a solicitation provision requiring the contractor to extend

on a day-for-day basis the 90-day component maintenance period and the 365-day central processor maintenance period whenever a component or the processor was inoperative for 8 consecutive hours or more than 10 hours in a 24-hour period.

CMI's first best and final offer took no exception to the liquidated damages provision but did not include a required configuration cost table and a specific list of manuals. CMI also offered a "prompt delivery discount" of $63,157 each from the price of systems 2 and 3 if the agency accepted them on schedule without exercising its right under the provision to delay delivery for the maximum 120 day period. IBM's price, including its proposed surcharges, was lower than that of CMI whether or not CMI's proposed prompt delivery discount was considered.

The agency states that it was uncertain whether IBM's proposed liquidated damage provision was a condition and whether CMI understood that the provision could result in liquidated damages of $14,000 per day. The agency reassessed its position and although there was some disagreement within the agency, it issued an amendment limiting the liquidated damages to $1,000 per day.

A second round of best and final offers was received on August 27. Among other things, IBM again proposed the surcharges mentioned above and took exception to a provision requiring equipment replacement and repair under certain conditions. CMI's best and final offer took no exceptions but it contained an unpriced configuration cost table and again stated that all manuals normally furnished by IBM would be furnished. CMI's prompt delivery discount was increased to $68,421 each for systems 2 and 3.

On September 29, the contracting officer recommended to the agency's contracts review board that award be made to IBM whose evaluated price was lower than that of CMI. This was so even though full consideration was given to CMI's prompt delivery discount and IBM's price included the surcharges which were evaluated at the maximum of 12 months because the agency could not determine whether these charges were meant to apply only during the 90-day period or the 1-year period. The review board rejected this recommendation because it felt that substantial agreement had not been reached and it ordered that the negotiations be reopened. The contracting officer, however, then recommended that award be made to CMI on grounds that IBM's proposal was unacceptable because of its insistence on major changes while CMI's failure to provide the cost table and list of manuals was insignificant. This recommendation was also rejected and the review board again ordered that negotiations be reopened with both parties.

The contracting officer then issued an amendment on November 16 to supersede all previous amendments. This amendment listed the required manuals, eliminated the cost table requirement and retained the liquidated damages provision, maintenance response time and downtime credit provisions as previously modified and

called for a third round of best and final offers by 2:00 p.m. November 23.

CMI and IBM submitted their offers on time and IBM's total price including surcharges for liquidated damages, maintenance response and downtime was $1,968,966. The specific amount of each of the surcharges was restricted from disclosure by IBM and the agency denied CMI's request for this information under the Freedom of Information Act. This information has, however, been provided to our Office and has been reviewed in connection with this decision.

CMI's offer was:

Hardware & Transportation	$2,189,474
Less: Prompt Delivery Discount	136,842
	2,052,632
Prompt Payment Discount (5%)	102,632
Total	1,950,000

The contracting officer recommended that award be made to CMI as the offeror with the lowest price. The review board, however, rejected this recommendation because CMI's price would be low only if the prompt delivery discount could be taken and the agency's ability to take advantage of this discount was speculative. The board recognized that the prompt delivery discount had been evaluated in CMI's previous best and final offers but pointed out that CMI's price had not been low even when the discount was considered.

CMI's offer was therefore evaluated by disregarding the prompt delivery discount. The prompt payment discount was then applied to the base price for hardware and transportation with the following result:

Hardware & Transportation	$2,189,474
Less: Prompt Payment Discount (5%)	109,474
Total	2,080,000

Award was made to IBM at an evaluated price of $1,968,005, which was $961 less than IBM's last offer because a portion of the surcharges was postponed until FY 84.

With respect to CMI's allegations of bad faith, bias and arbitrary action by the agency, we point out that a showing of bad faith requires undeniable proof that the agency had a malicious and specific intent to injure the party alleging bad faith. *Bradford National Corporation,* B-194789, March 10, 1980, 80-1 CPD 183. Further, we

will not find a discretionary action to be biased or arbitrary if the record indicates a reasonable basis for such action. *Decision Sciences Corporation,* B-183773, September 21, 1976, 76-2 CPD 260. Thus, even if it is assumed that the agency had a bias against CMI, it must be shown that it was translated into action which affected CMI's competitive position. See *Optimum Systems, Inc.,* 56 Comp. Gen. 934 (1977), 77-2 CPD 165; *Earth Environmental Consultants, Inc.,* B-204866, January 19, 1982, 82-1 CPD 43.

In our view, CMI has not submitted evidence meeting the heavy burden of proof imposed on any party alleging bad faith, bias or arbitrary action by an agency. CMI's allegations are based primarily on the fact that the agency requested three rounds of best and final offers and the agency's relaxation of the specifications which CMI views as unwarranted compromises of the agency's minimum needs in order to accommodate IBM. The record, however, supports the agency's explanation that the multiple best and final offers were required by its failure to receive unconditional offers until the receipt of the third best and final offers and its realization that some solicitation provisions which were inhibiting competition were not vital to its needs. The fact that IBM might have benefited more than CMI by these actions is irrelevant because there is no evidence that they were taken for any reason other than to promote competition by restating the agency's minimum needs more accurately. *International Computaprint Corporation,* B-207466, November 15, 1982, 82-2 CPD 440.

The factual situation presented here also does not show that an auction, within the meaning of Defense Acquisition Regulation (DAR) § 3-805.3(c), has taken place. Multiple calls for best and final offers do not automatically create an auction. See *Bell Aerospace Company,* 55 Comp. Gen. 244 (1975), 75-2 CPD 168.

Further, we do not agree with CMI's contention that after having evaluated the prompt delivery discount in all of CMI's previous offers without objection, the agency should have given CMI an opportunity to bid on the agency's "real delivery requirements" after the third best and final offers. Perhaps the agency should have earlier predicted the probability of a delay in its needs for the equipment due to the slippage in the van integration schedule but, at the time of the final evaluations, the agency had no reasonable grounds for believing that this discount could be taken. From the record it appears that CMI was aware of the delay of the van integration procurement and it should have been aware that the discount might not be evaluated. Clearly there was no need for additional best and final offers based on the real delivery requirements because CMI's offer provided a price if the discount could be taken and another price if delays made taking advantage of the discount unrealistic.

CMI also argues that the agency could have accepted, stored and shipped the systems at a cost substantially below the savings it

would have obtained if it had accepted the equipment on schedule and taken the discount. We do not agree. Consideration of CMI's prompt delivery discount would have required the agency to change its plans, locate appropriate storage and transportation, determine the attendant costs and evaluate the risks. Thus, at the time of the evaluation, the net savings to be obtained by taking the discount and the ultimate cost and risk to the Government were uncertain. In our view, the Government was not required to assume these risks.

CMI also contends that the agency had no reasonable basis for its belief that CMI may not have understood the extent to the liquidated damages provision and suspects that the agency contrived this reason as additional support for relaxing the provision to meet IBM's objections.

After IBM's objections, the using agency prepared an analysis of the initial liquidated damage clause and concluded that it was reasonable in view of the damages which could be anticipated if delivery of the equipment was delayed. Nevertheless, the contracting officer decreased the maximum liquidated damages exposure to $1,000 per day, believing that the $14,000 per day in damages would be viewed as an unenforceable penalty under DAR § 1-310.

We believe that the agency had ample grounds for revising this provision in spite of the analysis and regardless of whether CMI understood it. The analysis assumed complete inactivity on the part of all personnel to be assigned to the systems if the systems were delayed and that all components and items of software would result in equal damages to the Government if any of them were delivered late. The analysis contains no indication as to what the agency could do to mitigate its damages in case of late delivery. Moreover, the initial provision presented a total risk exposure which would exceed the contract price by 3.5 times and may therefore have been unenforceable. *See* 11 Comp. Gen. 384 (1932); *Allis-Chalmers Manufacturing Company,* IBCA No. 796-8-69, 70-1 BCA 8279.

We also find no basis to support CMI's speculation that the IBM surcharges may have been evaluated improperly. CMI contends that a correct evaluation would have resulted in IBM's price being $93,852.20 higher than CMI's price if CMI's prompt delivery discount had been included. However, as our discussion indicates, it was proper for the agency not to evaluate the prompt delivery discount and the record shows that the surcharges in IBM's best and final offer were calculated correctly.

The protest is denied.

[B-210467]

Mileage—Military Personnel—Ports of Embarkation and Debarkation—Payment Basis

Notwithstanding a Marine Corps regulation authorizing a mileage allowance and per diem from an alternate aerial port of debarkation to a new permanent duty station incident to a transfer from outside the United States to the United States, for the purpose of recovering a relocated privately owned vehicle, the member's entitlement is limited to allowances based on travel from the appropriate aerial port of debarkation serving the new station to the new station, in the absence of an amendment to the Joint Travel Regulations.

Matter of: Lieutenant Colonel Bruce L. Harjung, USMC, September 12, 1983:

Is a mileage allowance and per diem authorized for a member's travel from an aerial port of debarkation to a new station when incident to a permanent change of station from overseas the member selects a different aerial port of debarkation than the one serving his new station? Additionally, if the member arrives at the aerial port of debarkation serving his new station is he entitled to the allowances to the selected aerial port of debarkation? The answer to both questions is no, as will be explained.

These questions were submitted by Major M. K. Chetkovich, USMC, Disbursing Officer, Marine Corps Base, Camp Pendleton, California, and have been assigned Control No. 83-2 by the Per Diem, Travel and Transportation Allowance Committee.

Lieutenant Colonel Bruce L. Harjung, USMC, was ordered to make a permanent change of station from Okinawa to Camp Pendleton, California, in July 1982. Los Angeles International Airport is the appropriate aerial port of debarkation for Camp Pendleton. Apparently it is Marine Corps policy to allow a member under such circumstances to select an aerial port of debarkation nearest the place where his relocated privately owned vehicle is located. In Colonel Harjung's case, his family and his privately owned vehicle were at Quantico, Virginia. As a result he chose St. Louis as the nearest aerial port of debarkation. When Colonel Harjung traveled, however, he arrived at Los Angeles International Airport. He then traveled by commercial air and privately owned vehicle to Quantico and then to Camp Pendleton. He is claiming a mileage allowance plus per diem on a constructive basis from Los Angeles to St. Louis and then from St. Louis to Camp Pendleton.

Colonel Harjung's claim is based on an April 1982 Commandant of the Marine Corps message (ALMAR 111/82), which provides in part that when a member has a relocated privately owned vehicle, an alternate aerial port of debarkation may be selected for the purpose of picking up the vehicle. The regulation also provides that the member is entitled to a mileage allowance and per diem from the aerial port of debarkation nearest the relocated vehicle to the new duty station.

The disbursing officer notes that there does not appear to be any provision of Volume 1 of the Joint Travel Regulations (1 JTR) authorizing this entitlement and she asks whether payment may be made in this case on the basis of ALMAR 111/82. She indicates that Colonel Harjung's claim has been settled under 1 JTR, paragraph M4159, by paying a mileage allowance and per diem from Los Angeles International Airport, the appropriate aerial port of debarkation for Camp Pendleton, to Camp Pendleton.

In commenting on this situation, the Commandant of the Marine Corps supports payment of the claim on the basis of ALMAR 111/82. He advances the opinion that, which aerial port of debarkation is used is not a travel entitlement issue to be determined under the Joint Travel Regulations, but, rather, is a matter to be decided by the service concerned. Additionally, he notes that ALMAR 111/82 is in accordance with *Matter of Fedderman and Espiritu,* 60 Comp. Gen. 564 (1981); and 60 *id.* 562 (1981).

Prior to dealing with the entitlements in this case, certain assumptions must be made. Presumably "relocated privately owned vehicle" refers to the member's vehicle that was relocated incident to the travel of his dependents to a designated place in connection with his transfer to Okinawa, a restricted station. Travel to a designated place by dependents in these circumstances is authorized under 1 JTR, paragraph M7005. When a member is transferred from a restricted station to a nonrestricted station in the United States, transportation of his dependents and household goods from the designated place to the new station is authorized at Government expense. However, the member's entitlement is limited to travel from the old station to the new station. He does not receive any entitlements for his travel to or from the designated place where his dependents, household goods, and privately owned vehicle are located.

We cannot agree with the view that the port of debarkation is not a travel entitlement issue but rather is a matter for determination by the service concerned. Paragraph M4159-1-3 of 1 JTR provides that allowances may be paid for the official distance between the appropriate aerial or water port of debarkation serving the new station and the new station in connection with permanent change-of-station travel from outside the United States to a new station in the United States. Clearly, this is a travel entitlement issue since it affects the travel costs to the Government on permanent changes of station. To authorize alternate ports of debarkation which do not service the member's new station would be tantamount to authorizing circuitous travel to the member's new station at Government expense, which was never intended. See 54 Comp. Gen. 850 (1975) and 47 *id.* 440 (1968). Accordingly, we must conclude that the appropriate aerial port of debarkation in this case is Los Angeles.

While two decisions of this Office were cited by the Marine Corps in support of the authorization contained in ALMAR 111/82, a dis-

cussion of only one, 60 Comp. Gen. 562 (1981), will sufficiently explain our position. That decision involved travel entitlements of members who because of their assignments are entitled to transportation of their dependents and household goods to a designated place. We concluded that the Joint Travel Regulations could be amended to provide travel and transportation entitlements to the member in such cases before and after the permanent change of station if the travel was based on the need of the member to assist in arranging for transportation of dependents, household or personal effects, or a privately owned vehicle.

Amendments to Volume 1 of the Joint Travel Regulations authorizing travel in the circumstances described above have not been issued. Accordingly, no authority for such travel existed at the time of Colonel Harjung's change of station.

We recognize that the pertinent provision of ALMAR 111/82 was designed to defray the costs incurred by a member in traveling to the location of his dependents, household or personal effects, or privately owned conveyance incident to his return from a restricted station. However, 37 U.S.C. § 411 requires that regulations promulgated pursuant to 37 U.S.C. § 404 (which provides for members' travel entitlements) be uniform as far as practical in application to all the services. As a result an individual service is not authorized to promulgate regulations allowing an entitlement which has not been authorized by Volume 1 of the Joint Travel Regulations.

Accordingly, the settlement of Colonel Harjung's claim on the basis of mileage allowance and per diem for his travel from Los Angeles to Camp Pendleton was proper, and his claim for allowances from Los Angeles to St. Louis and then to Camp Pendleton may not be allowed.

[B-211820]

Appropriations—Availability—Air Purifiers (Ecologizer)

Purchase of air purifers that would clean the air of tobacco smoke in Department of Interior public reading room does not violate rule against purchasing equipment for personal benefit of individual employees, since all employees and members of public who use the room would benefit. 61 Comp. Gen. 634 is distinguished.

Matter of: Department of Interior—Purchase of Air Purifiers, September 12, 1983:

This is in response to a request by a Department of Interior contracting officer for our decision as to the propriety of the proposed procurement of two air purifiers for use in the Arizona Public Land Records Room. For the reasons stated below, we find that the proposed expenditures may be made.

The Acting Chief of the Branch of Lands and Minerals Operation, Bureau of Land Management, Department of the Interior, has requisitioned two "Smokeeaters," a type of air purifer, to be installed in a public land records room at a cost of $1200 plus instal-

lation costs. The small, enclosed room where the air purifiers will be installed is the sole source of public land records in the State of Arizona. The room was designed to service about one-third of the traffic it now accommodates. Typically about 100 people use the room daily. Users of the room often smoke cigarettes, cigars and pipes. As a result, the area is often filled with smoke, causing discomfort, annoyance and complaints from both the public and Government employees. The air conditioning system is not able to relieve the air of so much smoke. Also, while "No Smoking" signs have been posted, the policy of prohibiting smoking has not been effectively enforced.

The question posed by the contracting officer is whether our decision in 61 Comp. Gen. 634 (1982), where we held that the purchase of an air purifier for the use of an employee suffering from asthma was improper, applies to the proposed purchase. We conclude that it does not.

Our objection to the purchase in 61 Comp. Gen. 634 was that appropriated funds were used to make a purchase that was for the personal use of an individual employee. We have frequently held that such expenditures cannot be made from appropriated funds unless they are expressly authorized by Congress. See cases cited in our decision, *id.*, at 635.

The proposal to purchase air purifiers for a public reading room presents no such problem. From the justification for the purchase provided us, the air purifiers will benefit the public users of the reading room as well as improve the working conditions of Government employees who work in the area. Besides the obvious improvement in the comfort of all who use the reading room, the contracting officer notes that through the use of air purifiers the morale of employees who use the work area is expected to improve from the reduction in tobacco smoke. We reached a similar result in B-119485, April 15, 1954, where we concluded that the Public Health Service could purchase portable air conditioners for use in a dental clinic since the air conditioners would improve patient comfort and the efficiency of employees. Accordingly, we have no objection to the purchase of the air purifiers in this case if the appropriation used is otherwise available for this purpose.

[B-210338, B-202116]

Corporations—Legal Services Corporation—Conducting Training Programs—Advocacy of Public Policies

During January 1981, the Denver Regional Office of the Legal Services Corporation (LSC) held a training session for grantee personnel of the region. The training session speakers included Corporation headquarters officials and officials from grantees, who presented material on the LSC Survival Plan. These officials advocated the public policy of resisting the threatened Reagan Administration cuts in the legal services and other social benefits programs. These same speakers encouraged those in attendance to engage in political activities of building coalitions in order to mount a grass roots campaign to lobby Congress to vote against measures to curtail

these programs. This activity constituted a violation of 42 U.S.C. 2996f(b)(6) which prohibits the use of corporate funds by grantees to conduct training programs that advocate public policies or encourage political activities.

Corporations—Legal Services Corporation—Coalition and Network Building

The LSC held a training session in its Denver Region in January 1981. Representatives of grantees in the 5-state region attended. Corporate officials and grantee staff attorneys presented lectures and workshops on how grantees could build coalitions with community groups and agencies to form a grass roots organization to lobby Congress for legal services and other social benefit programs. Grantee representatives described coalition building projects that were underway. This activity constitutes a violation of 42 U.S.C. 2996f(b)(7) which prohibits grantees from using corporate funds to build organizations such as coalitions and networks.

Corporations—Legal Services Corporation—Advocacy or Opposition of Ballot Measures

During a January 1981 training session at the LSC Denver Region, Alan Rader, a staff attorney with the Western Center on Law and Poverty in Los Angeles, an LSC grantee, gave a presentation on how he had organized a campaign with LSC funds to defeat a 1980 California tax reduction ballot measure entitled "Proposition 9." He hired campaign coordinators and organized broad-based coalitions with community groups and agencies. This activity constitutes a violation of 42 U.S.C. 2996e(d)(4) which prohibits the Corporation and its grantees from using corporate funds to advocate or oppose ballot measures.

Corporations—Legal Services Corporation—Enforcement Responsibilities—Compliance of Recipients with LSC Act

The LSC and certain grantees conducted a training session in the LSC Denver Region in January 1981 during which grantee officials violated certain restrictions on training and coalition building activities contained in 42 U.S.C. 2996f(b)(6) and (7). The Corporation failed to carry out its enforcement responsibilities under 42 U.S.C. 2996e(b)(1) to insure the compliance of recipients and their employees with the provisions of the Legal Services Corporation Act of 1974, and assumed a contrary role of encouraging grantees to violate the aforementioned provisions.

To The Honorable Orrin G. Hatch, United States Senate, September 19, 1983:

This is in response to your recent letters requesting this Office to render a legal opinion concerning whether any of the documents and other materials that you recently obtained from the Legal Services Corporation (LSC) files and turned over to this Office contain evidence of violations of certain restrictions in the Legal Services Corporation Act of 1974 (42 U.S.C. § 2996).

BACKGROUND

At the end of 1980, Representative Sensenbrenner provided this Office with certain internal memoranda he had obtained from the LSC and requested an opinion on whether these documents indicated that the Corporation had violated Federal anti-lobbying laws. We rendered our opinion in 60 Comp. Gen. 423 on May 1, 1981, holding that the material in the memoranda indicated that LSC had itself engaged and allowed its grant recipients to engage in lobbying activities prohibited by Federal law. You have now provided

us with several hundred additional internal memoranda and other materials from the LSC headquarters and regional office files covering primarily the 1981 calendar year period and have requested a determination concerning whether these materials contain evidence indicating that LSC or its fund recipients violated statutory restrictions on its training and coalition building activities as well as restrictions on advocating or opposing ballot measures, initiatives and referendums.

It would require several months for us to review the enormous volume of material you have supplied and we plan to accomplish this task in connection with our investigation of the LSC survival plan that you requested. However, in order to comply with the short time frame of your request to provide you with a response regarding the issues referred to above by mid-September 1983, we have selected certain material that, in our opinion, indicates violations of restrictions you mentioned.

TRAINING SESSION

One piece of documentary evidence we reviewed was a video cassette recording of a training session at a Denver Regional Project Directors meeting conducted by the Corporation and certain grantees beginning on January 12, 1981, at the Hilton Harvest House in Boulder, Colorado. Similar meetings were held at the other regional offices during December and January 1981. Several officials from the Corporation headquarters in Washington and from grantee organizations located in the Western region of the country were present at the session and made presentations. These officials included Dan Bradley, President of the Corporation, Jeanne Connolly, Assistant Director of the Corporation's Government Relations Office, Alan Houseman, Director of the LSC Research Institute, Jonathan Asher, Executive Director of the Legal Aid Society of Metropolitan Denver, Alan Rader, Staff attorney with the Western Center on Law and Poverty in Los Angeles, a Corporation-funded California State Support Center, and Don Wharton from the Oregon Legal Services Corporation, a Corporation-funded Oregon State Support Center. The session was attended by approximately 100 persons, including program officials and staff attorneys from states comprising the Denver region and representatives of outside organizations.

We have summarized and in some cases quoted from the presentations of the above-mentioned speakers. This material is included as Appendix I (excluded from this publication but available upon request to the General Accounting Office). In analyzing the content of the first day presentations contained on the recording, we must conclude that the remarks of the speakers provide evidence of violations of statutory restrictions on the use of Corporation funds for certain activities which we shall explain below.

TRAINING PROHIBITION

The training prohibition is contained in 42 U.S.C. § 2996f(b)(6) and reads as follows:

> (b) No funds made available by the Corporation under this subchapter, either by grant or contract, may be used—
>
> (6) to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities, labor or antilabor activities, boycotts, picketing, strikes and demonstrations, as distinguished from the dissemination of information about such policies or activities, except that this provision shall not be construed to prohibit the training of attorneys or paralegal personnel necessary to prepare them to provide adequate legal assistance to eligible clients;

This provision restricts grantees and contractors from using funds provided by the Corporation to support or conduct training programs for the purposes of advocating particular public policies or encouraging political activities as distinguished from the dissemination of information about such policies or activities.

The legislative history contained in the House Committee on Education and Labor Report to accompany H.R. 7824, the Legal Services Corporation Act of 1974 (H. Rep. 93-247, 93rd Cong., 1st Sess. 11) is instructive regarding the intent of Congress concerning this provision. The section-by-section analysis explains the provision as follows:

> The Committee would like to assure that the legal services provided to eligible clients are of the highest quality. Although a recipient, therefore, should be funded to carry out an appropriate training program, *the Committee expects that no grantee—under the guise of fulfilling program training functions—will advocate any political action* including, but not limited to, boycott, demonstrations, strikes or picketing. Training programs should seek to fully inform attorneys and their clients about indigents' legal rights and how such rights can be implemented, but *the training sessions should not be organized to advocate particular political actions.* Moreover, while information is disseminated about public policies that affect poor people's lives, and while training programs should set forth relevant information concerning alternative means that can be utilized to enforce poor people's rights, the training sessions should not be organized to advocate any particular political action. The provision, setting forth the responsibilities of training programs, is not intended to prohibit attorneys, who are paid for by corporation funds, from providing legal advice to eligible clients and their organizations. [Italic supplied.]

It is clear from the legislative history that grantees and contractors are restricted from using funds provided by the Corporation for training programs that advocate particular public policies or encourage political activities, but are allowed to provide information about public policies and how they may affect clients. During training programs for attorneys and other staff personnel, grantees and contractors may legitimately disseminate information about such public policies that impact on poor people and discuss legal remedies that may be attempted on behalf of such clients. However, they are prohibited from advocating specific public policies or urging the use of political activities in connection with training programs. Grantees and contractors may neither directly conduct such training programs nor provide support to other organizations that are conducting such programs where such support involves the use of funds provided by the Corporation.

The January 1981 Denver Regional Project Directors Meeting was an official Corporation sponsored training function. Numerous grantee organizations within the boundaries of the Multi-state Denver region, and some from without, sent representatives to the session and paid their salaries, travel and transportation expenses from funds provided by the Corporation. A meeting agenda and participants' list was published which we assume was provided to participants in advance (see Appendix II). (Appendix II is excluded from this publication but available upon request to the General Accounting Office.) The agenda characterized many of the presentations in such descriptive terms as to put participants on notice that the presentations would almost surely constitute violations of statutory restrictions on the use of corporate funds. For example, some of the presentations by grantees were listed as: "Mobilization and Coalition Building Case Studies—The California Prop. 9 and Oregon Experiences"; Strategy Workshops in Network Building Skills"; "Client and Community Organization Networking"; and "Mobilization and Coalition Building." During the session, speakers from the Corporation and grantee organizations advocated particular public policies and encouraged political activities. Some speakers advocated a policy of resistance to Reagan administration-announced objectives to reduce the budget for, and scale down, all social benefit programs. For example, Mr. Houseman described the nature of the threat by stating:

> What is at stake is not solely the survival of the Legal Services program. What is at stake is the survival of many social benefits—entitlement programs that we struggled, since 1965, to make real for poor people. We have struggled since 1965 to bring into the belt federal, state and local benefits. What is at stake is a number of other kinds or programs like affirmative action, civil rights programs. That, in the end, is what is at stake in this battle. Those, in the end, are far more important than legal services. Legal services is a tool to get them. Both of those kinds of things, both of those problems—legal services, social benefits, entitlement programs, civil rights. Those are what are at stake in this battle.

Don Wharton stated that his group decided that it would be a kind of malpractice if his grantee organization failed to fight for all those programs of social benefits that people had worked so hard for over the past decade. Mr. Houseman's presentation was entitled "Strategies for the Future" and advocated a policy that the budget, structure and authority of the Legal Services Corporation be preserved at then current, or near then current, levels in the face of the threat that the Reagan Administration might adopt a policy to significantly reduce the budget and curtail the operations of the Corporation. Mr. Houseman analyzed specific proposals that might be adopted by the Reagan Administration and discussed some counter strategies. He pointed out Reagan could appoint many new directors to LSC's Board who might be hostile to aggressive legal services and the staff attorney system. The counter strategy was to attempt to persuade moderate Reagan supporters such as former Senator Ed Brooke to apply for appointment to the LSC Board. Mr. Houseman also anticipated opponents would attempt to impose ad-

ditional restrictions on legislative representation and cases that involve suits against the Government, aliens, education and abortion. He anticipated major efforts to eliminate the National and State Support Center System and recovery of attorneys' fees in suits against the Government. His counter to these threats was to establish a massive nationwide grass roots lobbying effort in order to influence Congress to vote against any legislation designed to implement any of these measures. Most of the speakers encouraged those in attendance to engage in political activities. These activities included building coalitions and networks with other organizations with shared interests, such as elderly groups, private attorneys, League of Women Voters chapters, labor unions, church groups and community organizations to establish a grass roots lobbying campaign to lobby Congress in support of Legal Services and other social benefit and entitlement programs and in opposition to Reagan Administration proposals to curtail these programs. For example, Mr. Wharton told grantees that they were in a political campaign and urged them to build coalitions with groups such as unions, attorneys and minority groups to be effective. For another example, Jeanne Connolly urged members of the audience to engage in political activities by encouraging their friends to write letters to Members of Congress on behalf of the Legal Services Program. She also suggested that grantees designate a staff person to write letters for outside community organizations and agencies to send to Members of Congress requesting their support for the Program. We cite this as an example of political activities prohibited by the training prohibition in 42 U.S.C. § 2996f(b)(6). However, such activity may violate antilobbying provisions contained in 42 U.S.C. § 2996e(c), applicable to the Corporation, and 42 U.S.C. § 299f(a)(5), applicable to grantees, to the extent that specific legislation was pending before the Congress that they were attempting to influence. See, for example, 60 Comp. Gen. 423, *supra.*

In sum, the above activity constitutes a violation of the training prohibition contained in 42 U.S.C. § 2996f(b)(6) because grantee officials at the Denver meeting were supporting and were conducting a training program for the purpose of advocating particular public policies and were encouraging grantees to engage in political activities. Although Corporation officials did not technically violate this provision, they are not blameless for reasons set forth in the next section.

CORPORATION ENFORCEMENT RESPONSIBILITY

We should point out that 42 U.S.C. § 2996f(b)(6) is a restriction on the use of corporate funds for training activities by grantees and contractors. The Corporation has a responsibility under 42 U.S.C. § 2996e(b)(1)(A) to insure the compliance of recipients and their em-

ployees with the provisions of the Legal Services Corporation Act of 1974. That section reads as follows:

(1)(A) The Corporation shall have authority to insure the compliance of recipients and their employees with the provisions of this subchapter and the rules, regulations, and guidelines promulgated pursuant to this subchapter, and to terminate, after a hearing in accordance with section 2996j of this title, financial support to a recipient which fails to comply.

This provision authorized the Corporation to enforce restrictions in the Act on fund recipients. Instead of carrying out this statutory enforcement authority, the Corporation assumed a contrary role of encouraging grantees to engage in training activities prohibited by 42 U.S.C. § 2996f(b)(6). The Corporation scheduled the Denver Regional Office training session, invited recipients to send representatives to be trained, established the agenda to present material on the LSC Survival Plan and arranged for high level corporate officials and grantee representatives from other regions to make presentations that in certain cases advocated activities that violated provisions of the Act. It should also be noted that even apart from subsection (1)(A), every granting agency has an affirmative duty to insure that its grantees do not expend grant funds for unallowable purposes.

The corporate officials and grantee representatives advocated a public policy of fighting threatened cuts in the Legal Services and other Federal social benefit and entitlement programs and encouraged persons in attendance to engage in political activities including the building of networks and coalitions of organizations so as to effectively operate a nationwide grass roots campaign to lobby Congress in support of policies advocated by the Corporation. Because the Corporation encouraged grantees to engage in activities prohibited by the Act it was in no position to discipline grantees for their violations by taking the sanction required in 42 U.S.C. § 2996e(b)(1)(A).

PROHIBITION AGAINST CREATING ORGANIZATIONS

The prohibition against the use of appropriated funds to create organizations and coalitions is contained in 42 U.S.C. § 2996f(b)(7) and reads as follows:

No funds made available by the Corporation under this subchapter, either by grant or contract, may be used–

(7) To initiate the formation, or act as an organizer, of any association, federation, or similar entity, except that this paragraph shall not be construed to prohibit the provision of legal assistance to eligible clients;

As with the training prohibition discussed above, this provision prohibits grantees and contractors of the Corporation from using funds provided by the Corporation to organize any association, federation or similar entity. However, this provision is not to be interpreted in a manner that prohibits eligible clients from receiving legal assistance.

The legislative history of this provision provides information essential to an understanding of the intent behind the statutory language. Originally the Legal Services Corporation Act of 1974 contained a more detailed prohibition against establishing organizations. In the section-by-section analysis of the House Committee on Education and Labor Report to accompany H.R. 7824, the Legal Services Corporation Act of 1974 (H. Rep. 93-247, 93rd Cong., 1st Sess. 11), the original provision was set forth and explained. The analysis stated that funds made available by the Corporation may not be used either by grantees or contractors:

(5) to organize, to assist to organize, or to encourage to organize, or plan for, the creation or formation of, or the structuring of, any organization, association, or coalition, alliance, federation, confederation, or any similar entity, except for the provision of appropriate legal assistance in accordance with guidelines promulgated by the corporation.

The Committees believes that recipients and their employees should not be permitted to utilize program funds to organize any organization, association, coalition, alliance, federation, confederation, or similar entity. The Committee expects that pursuant to guidelines issued by the corporation, recipients shall provide appropriate legal assistance to eligible clients and organizations of eligible clients. Recipients and their employees are prohibited from organizing a group, but shall be permitted to prepare papers of incorporation and rendered other legal assistance as necessary.

In 1977, Congress decided to clarify the prohibition and amended the original provision in Public Law 95-222, 91 Stat. 1619, December 28, 1977, to read as it does today. The House Report No. 95-310, 95th Cong., 1st Sess. 14, that accompanied the Legal Services Corporation Act Amendments of 1977 (H.R. 6666) explains the clarifying amendment as follows:

The vague and overly broad language in current law prohibiting the use of Corporation funds "to assist" or "to encourage" the organization of any group has caused legal services programs to refrain from providing the advice and legal assistance Congress intended should be available to clients who are engaged in organizing activities. The American Bar Association, among others, has criticized the present law as unconstitutionally vague and violative of First Amendment rights. Section 7(b)(7) cures this vagueness. *It prohibits the use of Corporation funds for direct organizing activities*, but permits advice and legal assistance to clients who may themselves be engaged in such activities.

The committee recognizes a distinction between proper activities such as (1) assisting groups of poor people to organize by providing advice on matters of incorporation, by-laws, tax problems and other matters essential to the planning of an organization; (2) providing counsel to poor people regarding appropriate behavior for group members; and (3) encouraging poor people aggrieved by particular problems to consider organizing to foster joint solutions to common problems on the one hand, and those activities *that are improper* on the part of legal services programs in that they usurp the rightful roles of poor people, as potential members of such organizations, *namely, actually initiating the formation of or organizing directly, an association, group, or organization.* [Italic supplied.]

The legislative history makes it plain that grantees and contractors may not use funds provided by the Corporation to initiate the formation, or act as organizer, of any organization, network or coalition. However, providers of legal services may give advice to eligible clients and assist them with matters that would enable them to plan, establish and operate an organization that the clients believe is in their best interest. For example, this provision would not prohibit a fund recipient from providing legal advice necessary to

establish a neighborhood day care center or a tenants' organization whenever such organizations are needed by clients for their own particular interests and direct benefit. On the other hand, recipients should not act as organizers of organizations on the basis of the recipients' perception that a particular organization would be beneficial to clients as a class or to the Legal Services Program. Also recipients should not initiate the formation of organizations where the initiating action is with the recipients and not with the clients. For example, this provision would prohibit a Corporation funded provider of legal services from organizing a group to campaign for the reduction of Defense spending on the theory there would be more funds available for Federal programs that assist poor people.

Almost without exception, each of the first-day speakers at the Denver Regional Project Directors Meeting that we named above devoted a large portion of time to a discussion of coalition building and networking, which is the establishment of informal organizational relationships on matters of mutual interest. Ms. Connally described the State Coordinator system that the Corporation and grantees had established in each state which served as a communications link between the Corporation headquarters and an informal state-wide organization of Legal Services Program supporters comprised of various organizations and individuals. Legal Services grantee organizations served as the core of State coalitions and provided financial and other support. Mr. Houseman outlined a plan to establish what he termed as an "outside Washington lobbying entity" that he referred to as "Action for Legal Rights." He stated that the organization was scheduled to be formally incorporated within the next week. He further indicated that plan called for LSC support centers (grantee fund recipients) to become affiliated with the organization, along with outside entities such as migrant farm workers groups.

Mr. Rader described a successful campaign that his support center funded with Corporation funds in California to defeat Proposition 9, a tax reduction ballot measure. He mentioned that his program had hired four field coordinators and built a coalition from organizations such as public employee unions and organizations interested in education, elderly groups and voluntary agency groups. Many of the 30 different Corporation funded Legal Services Programs in California committed staff time to the campaign and were involved in building the coalition of organizations involved in the campaign to defeat Proposition 9.

Don Wharton from the Oregon Legal Services Program explained that the Corporation fund recipients in his state were well on their way to building a state-wide coalition dedicated to the survival of Legal Services. Oregon Legal Services Programs had assigned staff members to perform liaison functions with organizations comprising the coalition. The state-wide coordinator, a Legal Services Pro-

gram deputy director, was responsible for coordinating the activities of these staff persons. Local programs were providing funds to pay the salary of a newly hired media and materials person whose efforts were devoted to the coalition.

These remarks by the above-named speakers reveal that a large number of Legal Services recipients were expending funds provided by the Corporation on organizing entities such as coalitions and networks in connection with the Legal Services survival program. These organizing activities were initiated and conducted by fund recipients themselves rather than in the course of providing a direct legal service to clients. In our opinion, such activities by LSC fund recipients violated the prohibition contained in 42 U.S.C. § 2996f(b)(7) against the use of funds provided by the Corporation to form organizations. Here again, the Corporation avoided its responsibilities under 42 U.S.C. § 2996e(b)(1) to insure the compliance of recipients and their employees with the provision of the Legal Services Corporation Act of 1974 and instead encouraged grantees to engage in the prohibited activities.

PROHIBITION AGAINST ADVOCATING OR OPPOSING BALLOT MEASURES

The prohibition against the use of appropriated funds to advocate or oppose any ballot measures, initiatives or referendums is contained in 42 U.S.C. § 2996e(d)(4) and reads as follows:

(4) Neither the Corporation nor any recipient shall contribute or make available corporate funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums. However, an attorney may provide legal advice and representation as an attorney to any eligible client with respect to such client's legal rights.

This provision restricts the Corporation and its fund recipients from making use of corporate funds or any personnel or equipment belonging to any LSC program organization to support, advocate, oppose, or urge the defeat of any ballot measures, initiatives, or referendums at the State, local or national levels of Government. On the other hand, a program attorney is free to provide advice and representation, as an attorney, to an eligible client with respect to such client's legal rights.

A review of the legislative history of this provision does not shed much light on what Congress intended beyond the plain meaning of the language of the section. The Conference Report of the Legal Services Corporation Act of 1974 (S. Rep. 93-845, 93rd Cong. 2d Sess. 22) makes the following comments concerning this provision:

The House bill and the Senate amendment prohibited the Corporation and any recipient from making available corporate funds, program personnel, or equipment for use in advocating or opposing ballot measures, referendums, or initiatives. The Senate amendment contained an exception to this prohibition where such provision of legal advice and representation is necessary by an attorney, as an attorney, for any eligible client with respect to such client's legal rights and representation. The House bill contained no comparable provision. The conference agreement prohibits advocating or opposing such measures, but provides that an attorney may provide

legal advice and representation as an attorney to any eligible client with respect to such client's legal right.

While the prohibition element of the provision is entirely clear, it might be helpful to offer our interpretation of the scope of the exception. Under the exception, a program attorney is authorized to provide legal advice and representation, as an attorney, with respect to such client's legal rights. The words "as an attorney" are significant because this restriction limits the attorney's role to that of protecting the client's rights and not of serving as a campaign manager, public relations advisor or major contributor. Persons desiring to offer a ballot measure need legal advice to know what legal rights they have under the law of the jurisdiction in which they are located. Accordingly, a program attorney is authorized to provide eligible clients with advice concerning their legal rights to offer ballot measures. Such advice would normally contain information on the requirements of law that the client must satisfy. For example, there is a general requirement that ballot measures be circulated among residents or registered voters of the jurisdiction in the form of a petition to obtain a certain number of signatures in order to have it placed on the ballot. Opponents of a measure frequently allege some defect(s) in the petition, such as irregularities with the qualifications of those signing the petition. Consequently, the matter may become the subject of litigation. A program attorney, as an attorney, may represent an eligible client who is sponsoring or opposing a ballot measure where the client's legal rights to offer or oppose the petition are at stake.

On the other hand, we think that a program attorney would be precluded by the above prohibition from providing any assistance in the form of Corporate funds or program personnel and equipment to a client waging a campaign in support of, or in opposition to, a ballot measure that is already on the ballot and before the voters. In this situation, the client's rights to offer or oppose a measure are not at issue so as to require the representation of an attorney.

Prior to launching the campaign against Proposition 9, Mr. Rader drafted a legal memorandum construing 42 U.S.C. § 2996e(d)(4) as allowing program attorneys to engage in a ballot measure campaign so long as they are representing an eligible client. Mr. Rader argued that the ballot measure restriction should be construed in the same manner as the restriction on legislative advocacy contained in 42 U.S.C. § 2996f. Mr. Rader also argued that the provision requiring "representation as an attorney" in 42 U.S.C. § 2996e(d)(4) concerning ballot measures should be considered to be amended by implication, inasmuch as a similarly worded provision in 42 U.S.C. § 2996f(a)(5) was amended by Congress in 1977 to read "representation by an employee of a recipient." Therefore, according to Mr. Rader, legislative advocacy activities could be performed by non-attorney employees of recipients.

We are not persuaded by Mr. Rader's arguments. Section 2996e(d)(4) of 42 U.S. Code is a blanket prohibition on both the Corporation and recipients which is a much broader prohibition against ballot measures than is the one against legislative advocacy contained in 42 U.S.C. § 2996f(a)(5) which affects only activities of fund recipients and includes several exceptions. Also, to be effective, an amendment of a provision must be express. Amendments by implication, like repeals by implication, are not favored in the law, and generally will not be upheld by the courts in doubtful cases. The Congress is generally not held to have changed a provision it did not have under consideration while enacting the amendment, unless the terms of the amendment are so inconsistent with the provisions of the prior law that they cannot stand together. See 1A Sutherland, Statutory Construction (4th ed. 139-140, citing cases).

In our opinion, based on Mr. Rader's description, the Corporation, the Western Center on Law and Poverty and certain other unidentified California Legal Services grantees violated the provision of 42 U.S.C. § 2996e(d)(4) in providing funds and personnel support for the Proposition 9 Task Force that operated a large scale opposition campaign to the Proposition 9 ballot measure during the first half of calendar year 1980. Mr. Rader in this campaign against Proposition 9 expended funds made available by the Corporation. He obtained a "Special Needs" grant from the Corporation for the Proposition 9 Task Force in the amount of $61,655 and also obtained staff commitments from approximately 30 California Legal Services Programs funded by the Corporation. The cost of these staff commitments is unknown and would be very difficult to compute, considering the lapsed time. However, we know that the campaign lasted approximately 3 months and that many staff persons at field offices throughout California devoted at least half their time to the campaign. With the grant, according to Mr. Rader, the Task Force hired 4 coordinators who had experience working with poor people and in political campaigns. Funds were also expended on clerical staff, travel, printing and postage associated with campaign activities. The Task force assembled a coalition of organizations, trained their members on the issues involved in opposing Proposition 9, and in voter registration and in get-out-the-vote techniques. The Task force activities described by Mr. Rader were the precise sort of activities that are prohibited by the statute's injunction against using corporate funds to oppose a ballot measure that is already on the ballot and where client's legal rights are not at issue.

SUMMARY

In summary, we wish to point out that we have not made a thorough review of all the LSC documents provided us by your office

concerning the LSC survival compaign. Therefore, we are unable to determine whether the January 1981 Denver Regional Project Directors Meeting is representative of LSC activities during the period in question. Indeed, we selected the material on this training session because it appeared to contain evidence indicating violations of the statutory prohibitions, that you cited in your request, by LSC fund recipients. After reviewing the training session material, we determined that certain LSC fund recipients had violated these statutory prohibitions, as has been described above.

Although appropriated funds were expended by these fund recipients contrary to law, we are of the opinion that the Government would be unable to recover the illegally expended sums from the recipients. In each instance the Corporation authorized and encouraged fund recipients to make the expenditures. By separate correspondence, we are recommending that the Corporation take appropriate action to amend its regulations governing the activities of fund recipients and Corporation officials in order to prohibit such expenditures in the future.

In accordance with your request, we are continuing our work on the overall investigation of the LSC survival campaign and members of our staff will contact your office from time to time to discuss this project.

[B-210437]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services—Dependent Children from Prior Marriage—Parent Not Occupying Government Quarters

Both of two uniformed service members, who are married to each other, and had dependent children in their own right prior to their marriage, may be paid an increased basic allowance for quarters on account of their respective dependents when the spouses do not reside together as a family unit because of their duty assignments. Whether the dependents reside with one, both, or neither of them would not affect their entitlement, provided that each member individually supports his or her dependent and is not assigned to Government family quarters.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services—Dependent Children from Prior Marriage—Parent Not Occupying Government Quarters

When two uniformed service members who are married to each other, and who had dependent children in their own right prior to their marriage, are assigned to the same or adjacent bases, are not assigned Government quarters, and live together as a family unit, only one member may receive a quarters allowance at the increased "with-dependents" rate, and the other member may receive it at the "without-dependents" rate. Only one set of family quarters is required and all the dependent children belong to the same class of dependents upon which the increased allowance is based whether the children live with the members or not. To the extent that 60 Comp. Gen. 399 may be understood to contradict this holding, it is hereby modified.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services—Dependent Children from Prior Marriage—Parent Not Occupying Government Quarters

When a uniformed service member's child meets the qualifications for becoming the member's dependent following the member's marriage to another member who is not the child's natural parent and the members have other dependent children, the child joins the class of dependent children upon which the member-parent's increased basic allowance for quarters entitlement is determined.

General Accounting Office—Jurisdiction—Military Matters—Dependency

Under 37 U.S.C. 403(h) the Secretary of the service concerned may make dependency and relationship determinations for enlisted members' quarters allowance entitlements and the determinations are final and may not be reviewed by the General Accounting Office. However, that provision does not apply to officers and the Comptroller General renders decisions in officers' cases and also in enlisted members' cases when requested by the service. In the interest of uniformity it seems appropriate to forward doubtful cases to the Comptroller General for decision particularly where an officer is married to an enlisted member.

Matter of: Chief Warrant Officer Ronald G. Hull, USCG, and Petty Officer Doris H. Hull, USCG, September 20, 1983:

This action responds to questions submitted by an authorized certifying officer of the United States Coast Guard concerning the propriety of payment of increased basic allowance for quarters on account of dependents, as claimed by Chief Warrant Officer Ronald G. Hull, USCG, and Petty Officer Doris H. Hull, USCG, who are married to each other and are not assigned to Government quarters. When the members reside together as a family unit, one is entitled to basic allowance for quarters at the with-dependent rate and one at the without-dependent rate. When the members are prevented from residing together as a family unit by their duty assignments, they both may be entitled to the allowance at the with-dependent rate.

The submission has been assigned control number ACO-CG-1411 by the Department of Defense Military Pay and Allowance Committee.

Facts and Questions Presented

Ronald and Doris Hull were married in January 1982. Prior to their marriage Mr. Hull received an increased allowance on account of his daughter of a previous marriage (to a non-member), and a son for whom he provided judicially ordered support. Mrs. Hull received an increased allowance on account of her daughter of a previous marriage (to a non-member).

It appears that both of Mr. Hull's children reside with their mother, and Mrs. Hull's daughter resides with her. The record further indicates that since their marriage, Mr. and Mrs. Hull and her

daughter have at times resided together as a family unit, but presently the two members are residing in different geographical areas. Both Mr. and Mrs. Hull claim an increased basic allowance for quarters on behalf of their dependent(s), each in his or her own right.

Concerning the propriety of payment of their claims, the certifying officer asks the following questions:

1. Are both members entitled to basic allowance for quarters at the with-dependent rate?

2. Would your answer be the same if the children were in the custody of another (not a member)?

3. If the answer to question 1 is affirmative, would the answer be the same if the members were living together as a family unit at the same or adjacent duty stations, under each of the following situations:

a. All children resided with the family unit.

b. Only one member's child (children) resided with the family unit.

c. None of the children resided with the family unit.

4. If both members had a child prior to the marriage but one of these children had not been approved as a dependent, could that child subsequently be approved after the marriage to entitle that member to basic allowance for quarters at the with-dependent rate?

Discussion

If adequate Government quarters are not provided for the dependents of a service member entitled to basic pay, that member is also entitled to an increased basic allowance for quarters on account of his or her dependents. 37 U.S.C. § 403 (1976), and Coast Guard Comptroller Manual (CG-264), Volume 2, para. 2B01031-F. The increased quarters allowance is paid at a single rate based on the member's pay grade regardless of the number of dependents. When two members are married to each other, only one of them may claim an increased allowance on account of the child or children of their marriage. Comptroller Manual, Table 2B01031-6, Rule 11; and 54 Comp. Gen. 665, 667 (1975). If one of the spouses is receiving an increased allowance for his or her children not born to the present marriage, any children born to or adopted by them are a part of the class of dependents for which the increased allowance is already being paid. 54 Comp. Gen. 665 (1975); 51 *id.* 413 (1972); *Matter of Cruise*, B-180328, October 21, 1974.

When a member has or acquires a stepchild as a consequence of a marriage to another member, the stepchild may qualify as a dependent child for increased basic allowance for quarters purposes. 37 U.S.C. § 401, and Comptroller Manual, para. 2B01033-B4.

Ordinarily, when a member is married to a member and they are assigned to the same or adjacent duty stations, but are not assigned Government quarters, only one member is entitled to the quarters allowance at the higher with-dependents rate based on the dependency of their children. The other member receives the allowance at the without-dependents rate. 51 Comp. Gen. 413 (1972), and Comptroller Manual, Table 2B01031-6, Rule 11. Also, generally when a member is married to a member and they are living in the same household and one of the members is receiving a quarters allowance at the with-dependents rate because of minor dependent children from a previous marriage not residing in the household, a child born of the two service members does not authorize the payment of another quarters allowance at the with-dependent rate. That is because the child of the present marriage is automatically included in the class of dependents (children) for which one of the members is already receiving the allowance. *Matter of Cruise*, B-180328, October 21, 1974; 54 Comp. Gen. 665 (1975); and *Matter of Sandkulla*, 59 Comp. Gen. 681 (1980). However, where married members are living separate and apart due to their military assignments, though married to each other, quarters allowance entitlement is to be determined on an individual basis. *Matter of Sandkulla*, cited above. The answers to the questions concerning Mr. and Mrs. Hull's quarters allowance entitlements should be based on the rules set out above.

Answers to Questions 1 and 2

Regarding questions 1 and 2, when Mr. and Mrs. Hull are residing separate and apart due to their duty assignments, their quarters allowance entitlements should be determined on an individual basis. Since each member has children of his or her own from previous relationships, when the members are living separately, they must provide separate sets of quarters, that is assuming that all the children do not live with one member. In such circumstances each is entitled to a quarters allowance at the with-dependents rate. This is the case whether each member's children are in the member's custody or in the custody of another. However, in the latter case, the member must be providing the required child support payments. In the case of an illegitimate child, the member-father must have been judicially decreed to be the father of the child or judicially ordered to contribute to the child's support. 37 U.S.C. § 401. Accordingly, subject to the conditions set out above, questions 1 and 2 are answered yes.

Answer to Question 3

As to question 3, when the members live together as a family unit, at the same or adjacent duty stations, they only need provide one set of quarters for the family unit and their quarters allowance

entitlement is determined accordingly. That is, only one member may receive the quarters allowance at the with-dependents rate based on the single class of dependents (children) whether all, some, or none of the children reside with the members.

In *Matter of Dependency Determination,* 60 Comp. Gen. 399 (1981), a member married to another member was held to be entitled to a basic allowance for quarters at the "with-dependents rate" on account of her child of a previous marriage, even though she was then married to a member also receiving a with-dependents quarters allowance on behalf of his children. Such dual with-dependents rate entitlements are proper when the two member-spouses live separate and apart due to the location of their duty assignments. To the extent that *Matter of Dependency Determination* may be read to mean that two members living in the same household may both be paid a "with-dependents rate" basic allowance for quarters on account of their dependent children born to previous relationships, the holding in that decision is hereby modified.

Answer to Question 4

Concerning question 4, if a child of one of the members had not qualified as a dependent prior to that member's marriage to the other member but subsequently met the requirements for a dependent, it would become one of the dependent children. That is, it would join the class of dependent children upon which the member's quarters allowance entitlement is based, as discussed in regard to questions 1, 2, and 3.

Authority to Make Dependency Determinations

In addition to the four questions discussed above, the certifying officer also asks whether the Secretary of the service concerned should make dependency determinations under 37 U.S.C. § 403(h) for the enlisted member in cases involving enlisted members married to officers. Under 37 U.S.C. § 403(h) the Secretary concerned may make determinations of "dependency and relationship" for quarters allowance entitlements for enlisted members only, and such determinations are final and not subject to review by "any accounting officer of the United States or a court, unless there is fraud or gross negligence." Thus, we are precluded from reviewing such determinations in most cases. However, as the certifying officer recognizes, we are not precluded from reviewing similar determinations regarding officers' dependents, and we also do render decisions determining the status of enlisted members' dependents when we are requested to do so by the services. See, for example, *Matter of Ranazzi,* B-195383, November 6, 1979; and *Matter of McCoy and Cooper,* 62 Comp. Gen. 315 (1983). In the interest of uniformly applying the rules to officers and enlisted members, particu-

larly in cases such as the present case where an officer is married to an enlisted member, it seems appropriate to forward doubtful cases to us for advance decision.

[B-212601]

General Accounting Office—Jurisdiction—Foreign Service Grievance Board Decisions

An employee of the Agency for International Development (AID) filed a grievance with the Foreign Service Grievance Board under 22 U.S.C. 1037(a) for credit of unused sick leave earned while he was employed by a United Nations agency. The Board found for the employee. An AID certifying officer thereafter submitted the case to General Accounting Office for review and decision. Under 22 U.S.C. 1037a(13) such decisions of the Board are final, subject only to judicial review in the District Courts of the United States. Therefore, this Office is without jurisdiction to review the Board's decision in this case. 57 Comp. Gen. 299 is distinguished.

Matter of: Pierre L. Sales—Foreign Service Grievance Board—GAO Jurisdiction, September 20, 1983:

This decision is in response to a request from a certifying officer, Agency for International Development (AID), on the question of whether an individual reemployed by AID following a period of "secondment" (transfer) to a United Nations (UN) agency may be credited with sick leave earned while with the UN agency, as ordered by the Foreign Service Grievance Board.

Before that issue may be considered, we must consider the threshold issue as to whether we have the jurisdiction to entertain the question. We conclude that we do not have the jurisdiction to consider the matter because by statute the Board's decisions on such matters are final, subject only to judicial review.

FACTS

The employee, Mr. Pierre L. Sales, was employed by AID. On February 1, 1969, he was separated for the purpose of transfer to the United Nations to serve as Deputy Resident Representative of the UN Development Program in Kinshasa, Democratic Republic of the Congo.

On May 1, 1976, following his separation from the UN agency, Mr. Sales exercised his reemployment rights with AID under section 528 of the Foreign Service Act and was appointed as a Program Officer. All annual, sick, and home leave hours which he had to his credit on the date he was transferred to the UN were restored to his account under the authority contained in section 3582(b) of title 5, United States Code.

On February 2, 1979, Mr. Sales requested that all sick leave (570 hours) which he had accrued, but did not use, during the period of UN employment from February 1, 1969, through April 30, 1976, be credited to his account. On February 12, 1979, AID disallowed his claim.

Following his retirement on February 28, 1979, Mr. Sales filed a grievance with the Foreign Service Grievance Board to overturn AID's action. On February 6, 1980, the Board found in favor of Mr. Sales. In paragraph VII of the Record of Proceedings No. 79-482-AID-145, the Board ruled that,

> AID is directed retroactively to recalculate the grievant's retirement annuity so as to reflect the crediting of his unused UN sick leave time.

In response to a request by AID in June 1981 that the case be reopened and reconsidered, the Board, on August 4, 1981, reaffirmed its February 6, 1980, decision.

By letter dated February 9, 1983, Bruce M. Berry, a Certifying Officer, questioned the propriety of the Board's action and requested a Comptroller General adjudication. We understand that Mr. Sales' case was submitted here based on an earlier case submitted by AID to this Office requesting our review and determination of the validity of the substantive finding on an entirely different issue, but by the same grievance board.

The case in question was *Frank H. Denton*, 57 Comp. Gen. 299 (1978). That case was presented here for decision because this Office had previously ruled on and approved AID's method of computing the post differential allowance authorized under 5 U.S.C. § 5925 (1976). Because we had previously ruled on the matter, which ruling was binding on AID, and because of the position in which AID found itself as a result of the contrary ruling of the grievance board in the *Denton* case, we did not consider the question of jurisdiction. Hence the issue of our jurisdiction to review the Board was not specifically raised or addressed.

The law creating the Foreign Service Grievance Board and establishing the grievance procedures thereunder, was contained in title IV of Public Law 94-141, November 29, 1975, 89 Stat. 765, 22 U.S.C. § 1037-1037c (1976). Subsequent to the Board's ruling in the present case, those provisions were repealed and reenacted without substantial change as Subchapter XI, Chapter 52 of title 22, United States Code (Supp. IV, 1980), 22 U.S.C. §§ 4131-4140, by Public Law 96-465, 94 Stat. 2142, October 17, 1980.

Section 1037a(13) of Title 22, United States Code (1976), provides, in part:

> (13) If the board finds that the grievance is meritorious, the board shall have authority * * * (B) to reverse an administrative decision denying the grievant compensation or any other perquisite of employment authorized by law or regulation when the board finds that such denial was arbitrary, capricious, or contrary to law or regulation * * *. *Such orders of the board shall be final, subject to judicial review as provided in section 1037c of this title,* * * *. [Italic supplied.]

Section 1037c of title 22, United States Code (1976) provides, in part:

> * * * any aggrieved party may obtain judicial review of * * * final actions of * * * the board * * * in the District Courts of the United States, * * *.

It is our position, therefore, that when the Foreign Service Grievance Board has rendered a final determination in an individual

case, over which it has jurisdiction, this Office is without jurisdiction to reverse, modify or otherwise review that ruling, even though we may disagree with the Board's conclusion. The forum for such review, if timely brought, is in one of the District Courts of the United States. If the time for judicial review has expired here, the certifying officer must comply with the Board's ruling in Mr. Sales' case.

[B-211737]

Payments—Prompt Payment Act—Waiver of Payment—Propriety

A Government contractor may waive an interest penalty payment issued to it under the Prompt Payment Act either by an express written statement or by acts and conduct which indicate an intent to waive.

Matter of: Central Intelligence Agency—Waiver of Interest under Prompt Payment Act, September 27, 1983:

By letter of May 5, 1983, the Central Intelligence Agency (CIA) requested our opinion as to the propriety of a contractor's waiver of a Government interest penalty payment under the Prompt Payment Act. Upon delay in payment of a completed contract, the CIA, in compliance with the Act, tendered the payment of interest. It did this by preparing a separate check in the proper amount to cover the interest penalty on the overdue bill. However, the contractor refused to accept the interest check and stated that it did not want or claim the interest penalty payment. The question presented is whether a Government contractor may waive the right to an interest penalty payment. If waiver is permissible, the next question is the method by which such right may be validly waived. We hold that waiver of an interest penalty payment under the Prompt Payment Act is permissible as long as the intent to waive is unmistakably clear.

The Prompt Payment Act, Pub. L. No. 97-177 (May 21, 1982), codified at 31 U.S.C. §§ 3901-3906, requires every Federal agency to pay an interest penalty on amounts owed to contractors for the acquisition of property or services when the agency fails to pay on time. The legislative history of the Act indicates that the interest penalty is a mandatory charge "that Government agencies will automatically be obligated to pay * * * without the necessity for business concerns to take action to collect such payments." H.R. Rep. No. 461, 97th Cong., 2d Sess. 8 (1982). Under the Act, it is clear that an agency must pay an interest penalty on all overdue bills. The implementing regulations of the Office of Management and Budget (OMB Circular No. A-125, August 19, 1982) confirm that payment is generally to be automatic.

As to whether a contractor must accept the penalty payment, the general rule is that rights granted by statute may be waived pro-

vided such waiver does not infringe on the rights of others and provided waiver of the right is not forbidded by law. See, *e.g. Office & Prof. Employees International Union Local 2* v. *Washington Metropolitan Area Transit Authority,* 552 F. Supp. 622, 631 (D.D.C. 1982). The determination of whether a statutory right is freely waivable "depends upon the intention of Congress as manifested in the particular statute." *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 704, 65 S. Ct. 895, 89 L. Ed 1296 (1945).

Nowhere in the language or legislative history of the Act does it state that a contractor is forced to accept the penalty payment. While the Act was enacted largely for the benefit and protection of Government contractors, it was also designed to "stigmatize" slow-paying agencies. H.R. Rep. No. 461, *supra.* Since a Government agency is legally obligated to tender payment, the policy behind the Act is not precluded if the contractor voluntarily refuses to accept. Also there is no practical way to compel the contractor to accept the money. The contractor is always free to return the money as a gift to the United States or, if the contracting agency has statutory authority to accept gifts, directly to it. Therefore, we hold that a Government contractor may legally waive his right to an interest penalty payment issued under the Prompt Payment Act.

The CIA also asks whether the contractor's act of refusal in this particular case constitutes a valid waiver. In general, waiver occurs when one evinces an intention to relinquish a known right. *Matter of Garfinkle,* 672 F.2d 1340, 1347 (11th Cir. 1982). Inasmuch as waiver is the abandonment of a known right, the right claimed to have been waived must have been in existence at the time of the waiver. Consequently, waiver could not be accomplished prospectively by means of a contract clause because the contractor would not yet be in a position to assert the right. In this case, however, the contractor is relinquishing a present right.

Waiver, involving as it does the notion of intention, may be either express or implied from conduct. To make out a case of implied waiver of a legal right, there must be a distinct, positive act which is inconsistent with the continued assertion of the right in question. *Weisbart & Co.* v. *First National Bank of Dalhart, Texas,* 568 F.2d 391, 396 (5th Cir. 1978). We hold, therefore, that a contractor may waive his right to a penalty payment either by an express, written statement, or by acts and conduct which indicate an intent to waive. In this case, by refusing to accept the check, the contractor has pursued such a course of conduct as to evidence an intention to waive his right to the penalty payment, and his conduct therefore constitutes a valid waiver.

Where waiver is implied, the acts or conduct relied upon to show waiver must make out a clear case. *Matter of Garfinkle,* 672 F.2d 1340, 1347 (11th Cir. 1982). Furthermore, the party alleging that waiver has occurred has the burden of proof to set forth the cir-

cumstances which establish the waiver. *Robinette* v. *Griffith,* 483 F. Supp. 28, 35 (W.D. Va. 1979). Certainly, an express written statement from the contractor is the clearest evidence of waiver. Absent such a statement, the agency should document the conduct establishing the waiver. If waiver is to be implied from the contractor's conduct, the conduct

should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible. *Buffum* v. *Chase National Bank,* 192 F. 2d 58, 61 (7th Cir. 1951).

Thus, if the contractor does not return the penalty check, but simply never cashes or deposits it, waiver should not be implied because a Treasury check is payable without limitation of time.[1] 31 U.S.C. § 3328(a)(1) (formerly 31 U.S.C. § 132(a)).

In view of the foregoing, we conclude that the contractor's waiver in this case is permissible and valid.

[B-212756]

Officers and Employees—Senior Executive Service—Bonuses, Awards, etc.

Fiscal Year 1982 bonuses and presidential rank awards were paid to members of the Senior Executive Service (SES) at various times depending on the particular agency's payment schedule. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award is considered paid on the date of the Treasury check.

Officers and Employees—Senior Executive Service—Bonuses, Awards, etc.

Career Senior Executive Service members who receive presidential rank awards under 5 U.S.C. 4507 are entitled to either $10,000 or $20,000, subject to the aggregate amount limitation in 5 U.S.C. 5383(b). For Fiscal Year 1982 rank award recipients who received a reduced initial payment by Treasury check dated on or after Oct. 1, 1982, an agency is required to make a supplemental payment up to the full entitlement, limited only by the new Executive Level I pay ceiling of $80,100. No supplemental payment may be made if the check is dated before Oct. 1, 1982.

Officers and Employees—Senior Executive Service—Bonuses, Awards, etc.

Performance awards (bonuses) may be paid to career Senior Executive Service members under 5 U.S.C. 5384, not to exceed 20 percent of annual basic pay and subject to the aggregate limitation in 5 U.S.C. 5383(b). If a bonus was paid by Treasury check dated on or after Oct. 1, 1982, an agency may, in its discretion, make a supplemental payment limited only by the new Executive Level I ceiling of $80,100, provided the bonus amount was calculated on a percentage basis. No supplemental payment may be made if the check is dated before Oct. 1, 1982.

[1] This of course would not be a problem in the presumably more common situation where an agency includes both principal and interest in a single check. On the assumption that a contractor is unlikely to return the entire check just to waive the interest, the contractor would have to negotiate the check and then take the affirmative step of writing its own check and returning it, presumably with a written statement that it is waiving the interest.

Matter of: Senior Executive Service—Supplemental Payments to Rank and Performance Award Recipients, September 27, 1983:

This decision responds to the request of the Assistant Attorney General for Administration, Department of Justice, for a decision whether members of the Senior Executive Service (SES) of that agency who were awarded presidential ranks or performance awards for Fiscal Year 1982, but who did not receive the full dollar amount of their respective awards because of the aggregate pay limitation contained in 5 U.S.C. § 5383(b), may now receive supplemental payments as a result of the December 18, 1982, increase in the Executive Level I pay ceiling.[1] For the reasons which follow, we conclude that supplemental payments may be made to those SES members who were partially paid their bonuses or rank awards in Fiscal Year 1983, limited only by the annual rate payable for Level I of the Executive Schedule, i.e. $80,100, effective December 18, 1982. No such supplemental payments may be made to those who were paid their awards in Fiscal Year 1982.

According to the Assistant Attorney General, Presidential Executive Rank Awards were approved by the President on September 29, 1982, pursuant to 5 U.S.C. § 4507(c), for a number of Senior Executive Service members of the Department of Justice. In addition a number of SES performance awards ("bonuses") under 5 U.S.C. § 5384 were approved by the Deputy Attorney General on September 30, 1982. All the rank awards and bonuses were certified for payment to the Treasury Department disbursing officer on September 30, 1982. However, checks were not dated and mailed by the Treasury Department until Fiscal Year 1983 (approximately October 5, 1982) nor received by the employees in question until approximately October 8, 1982. We understand that in other agencies some SES recipients received their payments before October 1, 1982.

Some of the senior executives who were given rank awards or bonuses received less than the approved amount because the approved amount when combined with their respective base salaries would have resulted in aggregate amounts in excess of $69,630 (the annual rate payable under Executive Schedule, Level I, during Fiscal Year 1982) in contravention of 5 U.S.C. § 5383(b). That section provides as follows:

> In no event may the aggregate amount paid to a senior executive during any fiscal year under sections 4507 [rank awards], 5382 [basic pay], 5384 [performance awards] * * * of this title exceed the annual rate payable for positions at level I of the Executive Schedule in effect at the end of such fiscal year.

Effective December 18, 1982, the statutory annual salary rate payable under Executive Schedule, Level I, was raised to $80,100.

[1] Other agencies have also encountered similar problems with SES award payments during that period. For that reason, our decision is not confined to the specific facts and payment dates involved in the Justice Department request.

Public Law 97-377, § 129(b), December 21, 1982, 96 Stat. 1830, 1914. It is this increase in the Executive Level I pay ceiling and its impact on the limitations of 5 U.S.C. § 5383(b) which have precipitated the questions raised by the Department of Justice and other Federal agencies as to the potential eligibility of senior executives to additional payments for SES ranks and bonuses awarded for Fiscal Year 1982.

In our opinion, it is clear that, for purposes of the aggregate amount limitation in 5 U.S.C. § 5383(b), employees who are given SES rank awards or bonus awards are paid on the date of payment rather than on the date of approval. In the example given by the Department of Justice, therefore, the date of approval, September 29 or September 30, would not be controlling for limitation purposes.

The next question is whether "payment" takes place on the date payment is scheduled for disbursement, the date of the Treasury check, or the date the check is received by the employee. We believe that the date of the check furnishes the most definite and certain answer to this question. That conclusion is consistent with the Prompt Payment Act, Public Law 97-177, § 6, May 21, 1982, 96 Stat. 85, which provides that a payment thereunder is deemed to be made on the date a check for the payment is dated. 31 U.S.C. § 3901(a)(5).

Therefore, for purposes of establishing aggregate amounts paid during a fiscal year under 5 U.S.C. § 5383(b), a senior executive is considered paid on the date of the Treasury check. Since the checks in payment of the awards to the Justice executives were dated on or about October 5, 1982, the senior executives in question were paid in Fiscal Year 1983 for the aggregate pay purposes of 5 U.S.C. § 5383(b). In other cases, if a check or checks were issued on or before September 30, 1982, those payments are considered to have been made in Fiscal Year 1982 for those purposes.

The remaining questions are whether supplemental payments to SES members are mandatory, discretionary, or prohibited. We shall address these questions below.

If an award under either section 4507 or section 5384 of Title 5, U.S. Code, was paid by a Treasury check dated on or before September 30, 1982, the payment is subject to the Fiscal Year 1982 ceiling of $69,630, and no supplemental payment may be made that would cause the aggregate amount paid during Fiscal Year 1982 to exceed that ceiling.

If, however, an award under either section was paid by Treasury check dated on or after October 1, 1982, the following conclusions apply.

For presidential rank award recipients under 5 U.S.C. § 4507 paid during Fiscal Year 1983, whose initial payment was reduced because of the $69,630 ceiling, an agency is required to make a supplemental payment so that the senior executive receives the full

amount of the $10,000 or $20,000 statutory entitlement under section 4507(e)(1) or (e)(2), limited only by the new Executive Level I pay ceiling of $80,100.

However, the amount of a performance award under 5 U.S.C. § 5384 is not fixed by statute; it is determined by the agency head but may not exceed 20 percent of the employee's basic pay. Accordingly, for performance award (bonus) recipients under 5 U.S.C. § 5384, paid during Fiscal Year 1983, an agency may, in its discretion, make a supplemental payment, limited only by the new ceiling of $80,100, if the initial payment was reduced because of the then applicable ceiling of $69,630.

The foregoing analysis and conclusions are intended to answer the Justice Department's inquiry and other questions that have arisen concerning SES awards. If there are specific situations not covered by the foregoing, they should be submitted for decision.

[B-210160]

Appropriations—Availability—Contracts—Amounts Recovered under Defaulted Contracts—Disposition—Funding Replacement Contract

Excess costs of reprocurement recovered from a breaching contractor by the Bureau of Prisons may be used to fund a replacement contract. It is illogical to hold a contractor legally responsible for excess reprocurement costs and then not permit the recovery of those costs to be used for the purpose for which they were recovered. As long as the Bureau receives only the goods and services for which it bargained under the original contract, there is no illegal augmentation of the Bureau's appropriation. Therefore these funds need not be deposited into the Treasury as miscellaneous receipts. Comptroller General decisions to the contrary are modified.

Matter of: Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action, September 28, 1983:

The Assistant Attorney General for Administration at the Department of Justice has requested our decision on whether certain funds, which were paid by a contractor in settlement of the Government's claim for breach of contract, may be used to replace defective work completed by the breaching contractor, without constituting an illegal augmentation of the appropriation from which the breached contract was initially funded. For the reasons given below, we conclude that the expenditure of those funds, as contemplated by the Department of Justice, would not constitute an illegal augmentation.

BACKGROUND

In June 1974, the Bureau of Prisons awarded to the General Electric Company a contract (number GS 09B-C-9021 SF) in the amount of $152,850 for the design, manufacture, and installation of laminated polycarbonate LEXGARD security windows for the Fed-

eral Correctional Institution, Pleasanton, California. When General Electric allegedly breached the contract by providing defective materials, the United States initiated legal action against it. The lawsuit was settled when General Electric agreed to pay $406,111.30 into the registry of the District Court for the Northern District of California. This amount was in full satisfaction of any and all claims by the United States against General Electric arising from that contract. (We have been informally advised by the Department of Justice that the large difference ($253,261.30) between the amount awarded under the contract and the amount of the damages which General Electric agreed to pay is due to inflation and substantial underbidding on General Electric's part when it originally obtained this contract. Justice also advised us that the $406,111.30 settlement amount was based upon the results of a new invitation for bids to secure a replacement contract.)

The District Court ruled that the money paid pursuant to the settlement agreement must be used to pay for the replacement of the faulty windows to the specifications required by the original Bureau of Prisons contract with General Electric. The court directed the Government to secure a replacement contractor whose bills for services and materials would be submitted to the court for payment from the amount paid by General Electric. The court also ruled that upon completion of the required work, the residue (if any) of the amount paid by General Electric would be turned over to the United States Bureau of Prisons. *United States* v. *General Electric,* Stipulation and Order Approving Compromise Settlement, Civ. No. 80-3485 TEH (N.D. Cal March 4, 1982). With regard to any residue which it may receive from the court upon completion of the replacement contract, Justice proposes to deposit such amounts into the Treasury as miscellaneous receipts. However, Justice is concerned that because the amount paid by General Electric greatly exceeds the amount paid under the breached contract, the balance of the court's order (requiring the use of the compromise settlement payment to fund a replacement contract) may result in an illegal augmentation of the Bureau of Prison's appropriation (number 15X1003) which was the funding source for the original contract.

Justice has reviewed our decisions in order to obtain guidance on this matter. Under those decisions, the "general rule," as prescribed by statute, is that all money received by and for the use of the Government must be deposited into the Treasury as miscellaneous receipts. *See* 31 U.S.C. § 3302 (formerly 31 U.S.C. § 484); 52 Comp. Gen. 45, 46 (1972). To the extent that such receipts are instead credited to a specific appropriation, they consititute an unlawful augmentation of that appropriation. Justice sees in our decisions two broad classes of exceptions. First, collections may be credited to a specific appropriation, rather than to miscellaneous receipts, when expressly authorized by statute. *See, e.g.,* 57 Comp.

Gen. 674, 685–86 (1978). Second, collections may be credited to an appropriation when they represent refunds or repayments of amounts which were improperly or erroneously paid from that appropriation. *E.g.* 61 Comp. Gen. 537 (1982); *see* 7 GAO Policy and Procedures Manual for Guidance of Federal Agencies §§ 13.2(2), 13.3.

Justice proposes that the present case be resolved by the creation of a new exception to the general rule. Justice argues that to the extent that the funds paid by General Electric in settlement of the breach of contract litigation are used to complete the work originally contracted for, they should be credited entirely to the appropriation which originally funded the contract rather than to miscellaneous receipts, and that such use for the replacement contract should not constitute an illegal augmentation of that appropriation.

PREVIOUS DECISIONS

We have on a number of occasions applied the exception for refunds of erroneous payments, described above by Justice, in the context of contractors who deliver defective work necessitating replacements. We have ruled that to the extent that a collection from the breaching contractor (or his surety) represents the recovery of payments which were in excess of the value of the goods or services that the agency actually received from the contractor, the collection is a repayment or refund, which may be credited to the agency's appropriation and used to pay for a replacement contract. *See, e.g.*, 44 Comp. Gen. 623 (1965); 34 *id.* 577 (1955); 8 *id.* 103 (1928).

Application of this reasoning in the instant case would justify the use of only $152,850, the amount of the original contract payments to GE, for the costs of a replacement contract. This is the only amount which can be said to represent an erroneous payment because no value was received from the original contractor. This amount, as explained above, falls far short of the amount needed to replace the defective work. As Justice has observed, unless there is a basis to apply a third exception to the general rule of 31 U.S.C. § 3302(b), the balance of the settlement would have to be deposited in miscellaneous receipts. This means that unless the agency has another source of funds available to recover the rest of the expenses of the replacement contract, a critical need might have to go unmet.

An argument could be made that since in this case the disposition of the entire settlement was ordered and controlled by a court, the usual rule does not apply. We have chosen not to consider the merits of that argument because the plight of Justice may be replicated many times by agencies who have reached agreements with the breaching contractor without instituting litigation. Resolution of contract disputes without resort to litigation is generally desired.

We have therefore elected to reconsider a number of our old cases without reference to the presence or absence of a court-approved or ordered settlement.

The majority of GAO decisions which deal with excess reprocurement costs involve defaults by the original contractor rather than completion of the work in a defective manner. In both situations, the contract has been breached, and in both, the need for a replacement contract is attributable to the contractor's breach. We will therefore discuss our decisions on excess reprocurement costs without reference to the event that gave rise to the need for the replacement contract—that is, whether occasioned by a default or by defective workmanship.

GAO has long held that excess reprocurement costs—*i.e.,* costs incurred by the Government because of the breach of contract which exceed the amounts originally obligated for the procurement in question—should be charged to the account of the original contractor. However, any such amounts which the agency is able to recover must immediately be deposited in the Treasury as miscellaneous receipts. (See 14 Comp. Gen. 729, 730 (1935) for a clear statement of that principle.)

Moreover, we have held this to be the rule despite the possibility that the agency involved might not have enough unobligated funds in the balance of the applicable appropriation to fund a replacement contract. In one decision, for example, we quoted the General Counsel of the Office of Economic Opportunity who offered this analysis:

> * * * It would seem that the controlling consideration in determining the disposition of recoveries from defaulting contractors should be whether such recoveries augment the agency's appropriation, in which case they should be deposited in the Treasury as miscellaneous receipts, or whether they merely offset additional government expenses resulting from the contractor's breach, in which case they should be considered in the nature of an adjustment and returned to the appropriation account. In this latter situation, the recoveries do no more than permit the agency to carry out the program contemplated by the Congress without having to return for an additional appropriation because of the failure of the contractor to perform * * *. 46 Comp. Gen. 554, 555 (1966).

While we acknowledged that those reasons "are not regarded as being without merit," we refused in that case to alter or deviate from the general rule that recovered excess reprocurement costs must be deposited into the Treasury as miscellaneous receipts. *See also,* 10 Comp. Gen. 510, 511 (1931).

More recently, we addressed the question of defaulting contractors and replacement contracts without dealing directly with how collections from the defaulting contractor should be handled. In 60 Comp. Gen. 591 (1981), we decided that when a contract is terminated because of default by the contractor, the amounts obligated to fund the original contract remain available to fund a replacement contract. With regard to reprocurement costs in excess of the amount of the original contract, we stated:

• • • Legally, the defaulting contractor is liable to the Government for the additional cost of the replacement contract. However, recovery of such funds by the Government may be subject to a great deal of uncertainty and delay • • •. Hence, the agency may utilize unobligated funds, if any, from its prior year's appropriations to increase the amount of obligations chargeable in that year for the original contract in order to pay the replacement contractor the full amount owed (while continuing to attempt collection from the defaulting contractor • • •). *Id.* at 595.

We stopped short of explaining how the replacement contract was to be funded if there were no unobligated funds available to cover the excess reprocurement costs.

DISCUSSION

After carefully reconsidering our earlier decisions in light of the arguments presented by the Department of Justice, we are convinced that our rule (requiring the entire amount of excess costs recovered from a defaulting contractor to be deposited into the Treasury as miscellaneous receipts) is wrong. The rule disrupts the procurement process and is not required by 31 U.S.C. § 3302.

The existing rule penalizes an agency for an event which lies beyond its control—a breach by the contractor. Because the agency may not use the excess reprocurement costs which it recovers from the contractor, even though the recovery is entirely adequate for that purpose, if it lacks adequate unobligated funds to pay such costs, it must either forgo an urgently needed procurement or else it must seek a supplemental appropriation from the Congress. Thus, our present rule places an added burden on the legislative process, as well as on the procurement process.

We do not think it is logical to insist that a breaching contractor is legally responsible for excess reprocurement costs and then, when the contractor fulfills that obligation, refuse to permit his payments to be used for that purpose. We regard the contractor's payments as being analogous to a contribution to a Government trust account, earmarked for a specific purpose. Just as the proceeds of a trust are considered to be appropriated for the purpose for which the funds were deposited, so too should excess reprocurement collections be considered to be available only for the purpose of funding a replacement contract.

This use of the recovered excess reprocurement costs does not, in our view, constitute an illegal augmentation of the agency's appropriation. The agency is being made whole at no additional expense to the taxpayer. It will merely be receiving the goods or services for which it bargained under the original contract.

We, therefore, decided that to the extent necessary to cover the full costs of a replacement contract, excess reprocurement costs recovered by an agency from a breaching contractor need not be deposited in the Treasury as miscellaneous receipts, but rather may be applied to the costs of the replacement contract. The replacement contract must be coextensive with the original contract; that is, it may procure only those goods or services which would have

been provided under the breached contract. Any recovered excess reprocurement costs which are not necessary or used for such a replacement contract must still be deposited into the Treasury as miscellaneous receipts. To the extent that they are inconsistent with this decision, the following (and any other similar) decisions are hereby modified: 52 Comp. Gen. 45 (1972); 46 *id.* 554 (1966); 44 *id.* 623 (1965); 40 *id.* 590 (1961); 34 *id.* 577 (1955); 27 *id.* 117 (1947); 14 *id.* 729 (1935); 14 *id.* 106 (1934); 10 *id.* 510 (1931); 8 *id.* 284 (1928).

CONCLUSION

We conclude that the use of General Electric's settlement payment to fund the replacement contract under the terms of the court's order will not result in an illegal augmentation of the Bureau of Prison's appropriation number 15X1003. Of course, as Justice is aware, any residue from General Electric's payment which the agency may receive from the court upon completion of the replacement contract must be treated as damages and deposited into the Treasury as miscellaneous receipts.

[B-201164]

Contracts—Payments—Assignment—Set-Off—"No Set-Off" Clause

Under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, a lender is not protected against set-off by the presence of a no-set-off clause in the assigned contract unless the assignment was made to secure the assignee's loan to the assignor and only if the proceeds of the loan were used or were available for use by the assignor in performing the contract that was assigned. To the extent that our holdings in 49 Comp. Gen 44. (1967), 36 Comp. Gen. 19 (1956), and other cases cited herein are not consistent with this decision they will no longer be followed. 60 Comp. Gen. 510 (1981) is clarified.

Set-Off—Contract Payments—Assignments—"No Set-Off" Provision—Tax debts—Set-Off Precluded

When a contract containing a no-set-off clause is validly assigned under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, to an eligible assignee who substantially complies with the statutory filing and notice requirements, the Internal Revenue Service cannot set off the contractor's tax debt against the contract proceeds due the assignee, even if the tax debt was fully mature prior to the date on which the contracting agency had received notice of the assignment. B-158451, Mar. 3, 1966, and B-195460, Oct. 18, 1979, are modified accordingly. 60 Comp. Gen. 510 (1981) is clarified.

Matter of: Reconsideration of 60 Comp. Gen. 510 (1981) Involving Set-Off Authority of Government When Contract Contains a "No Set-Off Clause," September 29, 1983:

This decision is in response to a request from the Internal Revenue Service (IRS) for us to reconsider and modify our holding in 60 Comp. Gen. 510 (1981) concerning the set-off authority of the IRS when a Government contract containing a "no set-off clause" is assigned.

In that decision we considered the relative priority of a Federal tax lien against a Government contractor and the claim of the bank to which the contractor had assigned his rights under the contract in accordance with the provisions of the Assignment of Claims Act, formerly 31 U.S.C. § 203, now codified at 31 U.S.C. § 3727. The bulk of that decision dealt with the situation that existed when the contract involved did not contain a no-set-off clause. We held that in the absence of a no-set-off provision, a claim by the IRS or other Federal entity that arose before the assignment became effective could be set off against the amount otherwise payable to the assignee under the assigned contract. The IRS is not asking us to reconsider that portion of our decision.

However, our decision in that case also addressed the matter of priority when the Government contract did contain a no-set-off clause. In this respect we said the following:

> It is well settled that the presence of a no set-off clause in a contract prohibits IRS or any other Government agency from making any claims to the monies due the assignee under the contract.

Similarly, one of the digests in the decision states that:

> If Government contract contains a no "set-off" clause, Government cannot set-off tax debt of assignor under any circumstances.

The IRS is now requesting us to reconsider our holding regarding the priority question when a no-set-off clause is contained in an assigned contract, particularly as that holding would apply to the facts of a specific case described in the IRS request (which is discussed at greater length below). Specifically, the IRS requests us to adopt the position that our holding concerning the protection afforded assignees by the no set-off clause should be narrowed so that it only applies (1) if the assignee files a proper notice of assignment that satisfies the statutory requirements prior to the IRS tax levy or request for set-off and (2) if the proceeds of the loan secured by the assignment were used or at least were available for use by the assignor in the performance of the assigned contract.

For the reasons set forth hereafter, we agree with the IRS' second point that the no-set-off clause does not prohibit set-off when the underlying loan is not used or available for use by the assignee in performing the assigned contract.[1] However, we do not concur with IRS' first contention that notwithstanding the presence of a no set-off clause, set-off is permissible if the IRS tax claim arises before the assignee notifies the contracting agency of the assignment.[2]

The specific case that appears to have prompted the IRS to request us to reconsider our earlier decision was summarized as follows in the IRS letter and accompanying attachments. In July

[1] Set-off is also permissible, notwithstanding the presence of a no set-off clause, if the assignment was not made to secure the assignor's indebtedness to the assignee or to the extent the contract proceeds exceed that indebtedness.

[2] In our 1981 decision which held that if the contract does not contain a no set-off clause the IRS can set-off a tax claim that arises before notification of the assignment is received, we took the position that set-off was permissible if the tax debt of the assignor was in existence even if not yet due (mature) before notification.

1973, Ward La France Trucking Corporation (Ward La France) entered into a defense contract with the United States Army. The contract contained the standard no set-off clause authorized by 31 U.S.C. § 203 (now codified at 31 U.S.C. § 3727) and section 7-103.8 of the Armed Services Procurement Regulation. Subsequently, on August 3, 1978, Ward La France assigned the contract to Marine Midland Bank (Marine) "in order to secure new operating capital loans." At the time of the assignment, Ward La France had already completed performance of the assigned contract. Moreover, IRS states that the "loans secured by the assignment were not used in Ward La France's performance of the subject defense contract." The IRS further states that it "levied on the contract proceeds prior to the filing of the notice of the assignment with the defense contract disbursing officer and the Army contracting officer."[3]

In order to facilitate payment of the uncontested monies due under the assigned contract and to preserve the rights of the parties pending litigation, an escrow agreement dated August 24, 1981, was entered into between Marine and the IRS. The agreement preserved the set-off claims, tax liens, or other statutory claims of the Government and also the contractual and statutory claim of Marine in the $625,000 escrow fund. We also note that paragraph 7 of the escrow agreement specifically provides that if the parties are unable to reach a satisfactory agreement as to the disposition of the escrow account "then the respective rights of the parties to such account shall be submitted to a federal court of competent jurisdiction, for adjudication as to the relative priority status and validity of all competing setoffs, liens, and claims."

As explained at greater length hereafter, it is our view that since Marine's loan to Ward La France was made after Ward La France had already completed performance on the contract, Marine was not protected against set-off by the presence of the no-set-off clause in the assigned contract.

The matter at issue here turns on the proper interpretation and application of a provision, contained in certain Federal contracts, that is commonly referred to as a "no set-off clause." In this respect 31 U.S.C. § 3727 [4] reads as follows:

(d) During a war or national emergency proclaimed by the President or declared by law and ended by proclamation of law, a contract with the Department of Defense, the General Services Administration, the Department of Energy (when carrying out duties and powers formerly carried out by the Atomic Energy Commission), or other agency the President designates may provide, or may be changed without consideration to provide, that a future payment under the contract to an assignee is not subject to reduction or setoff. A payment subsequently due under the contract (even after the war or emergency is ended) shall be paid to the assignee without a reduction or setoff for liability of the assignor—

[3] While the IRS letter goes on to state that the disbursing officer's files do not contain any record of the assignment notice, IRS does not argue that the notice was legally insufficient under the Act. Moreover, it appears that the contracting officer did receive formal written notice of the assignment and that the disbursing officer did receive "actual" notice. Accordingly, the adequacy of the notice received by the IRS was not considered to be an issue in this case.

[4] Prior to the revision and codification of title 31, United States Code by Pub. L. No. 97-258, 96 Stat. 877, September 13, 1982, this provision was set forth in 31 U.S.C. § 203 in essentially the same terms.

(1) To the Government independent of the contract; or
(2) Because of renegotiation, fine, penalty (except an amount that may be collected or withheld under, or because the assignor does not comply with, the contract), taxes, social security contributions, or withholding or failing to withhold taxes or social security contributions, arising from, or independent of, the contract.

As stated above, in 60 Comp. Gen. 510 we said that the presence of a no-set-off clause in a contract prohibits the Government from setting off the assignor's tax debts against the monies due the assignee under the assigned contract. While that statement and the related digest may have been somewhat broader than was necessary (or perhaps advisable), we believe that when read and considered in the context of the entire decision, our intended meaning should not be unclear. That is, in making that broad statement, we assumed that the contract involved was validly and properly assigned to an eligible assignee in accordance with all of the statutory requirements contained in the Assignment of Claims Act. For example, in digest 1 of the decision we said the following:

Assignment of claim to proceeds under Federal Government contract must be recognized by contracting agency and all other Federal Government components including * * * IRS, *if assignee complied with filing and other requirements of Assignment of Claims Act* * * *. [Italic supplied.]

Since the validity of the assignment under the Assignment of Claims Act was not at issue in 60 Comp. Gen. 510, that decision did not address the statutory requirements that must be satisfied in order for an assignment to be deemed valid.

Clearly, we would agree that if a contract is assigned improperly or if the assignor or assignee does not fulfill all of the statutory requirements, the assignment would be invalid and would not be recognized by our Office. In that case, the presence of a no set-off clause in the assigned contract would not provide the assignee with any protection against set-off by the Government. See 58 Comp. Gen. 619 (1979); 55 *id.* 155 (1975); 54 *id.* 137 (1954); 49 *id.* 44 (1969); B-171063, February 16, 1971; and cases cited in the decisions.

The IRS' second contention (which we have considered first since it is dispositive of the instant dispute between Marine and the IRS) is that an assignment is not valid under the Assignment of Claims Act unless the assignment was made to secure a loan whose proceeds were used or were available for use by the contractor in the performance of the contract. The decisions of our Office have consistently upheld the view that an assignment of a Government contract, and any no-set-off clause contained therein, is only valid if the assignment was made to secure a loan made by the assignee to the assignor and only then to the extent that the assignor remains indebted to the assignee. B-177648, December 14, 1973; B-176905, November 1, 1972; B-175670, May 25, 1972; B-171063, February 16, 1971; B-159320, July 7, 1966; B-137321, October 13, 1958; 37 Comp. Gen. 9 (1957); 35 *id.* 104 (1955). Also see *Beaconwear Clothing Co.,* v. *United States,* 174 Ct. Cl. 40, 355 F.2d 583 (1966). Therefore, even if a no-set-off clause is present, it always has been and remains our

position that whether or not the Government's claim arises before notice of the assignment is received, the Government can set off the assignor's debts to the extent the contract proceeds exceed the assignor's remaining indebtedness, if any, to the assignee.

However, as to whether a loan must be made for a particular purpose relating to the performance of Government contracts by the assignor in order for the assignment to be recognized as valid, our decisions have reflected a somewhat different interpretation of the Assignment of Claims Act over time. Initially, our Office took the position that a validly executed assignment of a contract containing a no-set-off clause could defeat the Government's set-off claim even if the loan secured by the assignment was not made for the purpose of financing the assignor's Government contract work. See 36 Comp. Gen. 19 (1956); B-131183, March 13, 1958; B-138974, May 23, 1960; and B-142275, March 26, 1965. Thereafter, we modified our prior interpretation and held that the no-set-off clause did not preclude set-off "unless the outstanding indebtedness represents loans made to the assignor for the purpose of carrying out contracts with the Government." See 49 Comp. Gen. 44 (1967) and 54 *id.* 80 (1974).

In 1974 we adopted our current position in this respect. In 54 Comp. Gen. 137 (1974) we considered a case in which the loan secured by the assignment was made after performance of the assigned contract was completed. After analyzing several judicial opinions interpreting the Assignment of Claims Act, we said the following:

> We take these cases, therefore, to affirm a policy of encouraging the financing of Government contracts by not limiting to the initial amount loaned the no set-off protection of parties which lend a contractor several sums for the performance of a contract. However, * * * [none of these cases] stand for the proposition that parties which lend money to a firm having both completed (from the contractor's point of view) and on-going contracts are protected against setoff under the completed contract.
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> First National City loaned Trilon $250,000 believing that the subject contract was fully performed. It therefore quite reasonably anticipated that no further funds would flow to Trilon from this contract. Yet, when funds did become available the bank asserted a claim against them.
>
> * * * the bank's entitlement is secondary to the setoff rights of the Federal Government. And, since we conclude that the Assignment of Claims Act does not extend no setoff protection to First National City Bank in this instance, the Government may properly exercise its right of setoff to the $54,369.37 in question.

Thus, in 54 Comp. Gen. 137, we held that the presence of a no-set-off clause in the assigned contract does not preclude setoff by the Government if the loan secured by the assignment is made after the contract has been fully performed, presumably making the lender assignee aware that "the money lent will not be applied to performance of the contract." Our Office interpreted the Assignment of Claims Act in a similar manner to reach a similar result in 55 Comp. Gen. 155 (1975). As stated above, this interpretation of the Act and the no-set-off clause represents our current position in

this respect. It is entirely consistent with the most recent judicial interpretation of the Act and the no-set-off clause.

The leading court case in this respect is *First National City Bank* v. *United States,* 212 Ct. Cl. 357, 548 F.2d 928 (1977), which IRS cited and relied upon in its request to us for reconsideration. In that case the court considered the same factual situation that we had addressed previously in 54 Comp. Gen. 137. While the court's disposition of the case was not entirely consistent with that of the Comptroller General (differing in some respects that are not at issue here), the court did concur in our view that an assignment was not valid against the Government unless the proceeds of the loan secured by the assignment were available for the performance of the contract. In this respect the court held as follows:

> The objective of the 1940 Act was to authorize the financing of individual government contracts in the sense that Congress wished the holder of such a pact to be free to receive financial help in performing his agreement in reliance on the security of the expected government payments from that contract. At the same time Congress did not, we think, wish to eat into the Government's normal right of setoff against the assignor more than would be necessary to induce such monetary aid in performing. *Where a contract has been fully completed, further aid is not needed for that contract and there is no occasion to give up the right of setoff.*
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> This view does not mean that loans must be tied to particular contracts nor does it go counter to the endorsement of the revolving-credit plan in *Continental Bank & Trust Co.* v. *United States,* 416 F.2d 1296, 189 Ct. Cl. 99 (1969). In all of our prior cases, including Continental Bank, which have upheld the financing institutions' right to recover free of setoffs, the loans were made before the completion of the particular contract and were available to help in the performance of that work—even though the loans may not have been tied to, or designated as directed to, a or the specific contract * * *. *It is only where the contract has been fully performed before the loan is made that the institution cannot call upon that right [of no setoff] under that particular contract.*
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> For these reasons, we hold that plaintiff does not belong within the class of assignees or of those "participating in such financing" under the 1940 Act, and has no rights under that statute. [Italic supplied.]

Subsequently, in *Manufacturers Hanover Trust Co.,* v. *United States,* 590 F.2d 893 (Ct. Cl. 1978), the Court of Claims reaffirmed its holding in *First National City Bank* that "in order for a lending institution to achieve the status of an assignee under the Assignment of Claims Act of 1940, it had to be shown that the monies which that institution had advanced to the contractor were actually used in, or at least made available for, the performance of the contract(s) in question." Also, see 58 Comp. Gen. 619 (1979), in which we cited the court's holding in *First National City Bank* as standing for the same proposition at least when the issue is as it is here, whether an assignee bank is protected by a no-set-off clause in the assigned contract.

Thus, we concur in the IRS's second contention that under the Assignment of Claims Act a lender is not protected against set-off by the presence of a no-set-off clause in the assigned contract, if the proceeds of the loan secured by the assignment were not used or

available for use by the assignor in performing the contract that was assigned. Our decision in 60 Comp. Gen 510 (1981) is clarified in accordance with our position as set forth herein. Moreover, to the extent that any of our prior decisions, cited above, have taken a contrary position they will no longer be followed by our Office.

Applying our position in this respect to the instant case, we would advise the IRS as follows in connection with its negotiations with Marine under the terms of the August 24, 1981, escrow agreement mentioned above.

Based on the information contained in the IRS submission, it appears that the contract proceeds were assigned Marine after the contract had been fully performed, in order to secure new operating loans. Obviously, therefore, these new loans could not have been used or available for use by Ward La France in performing the already completed contract. Accordingly, it is our view that the presence of the no-set-off clause in the assigned contract would not prevent IRS from setting off the contractor's tax debts against the contract proceeds otherwise payable to the assignee.

While the foregoing is dispositive of the specific case involved here, we note that the IRS request for us to reconsider our decision in 60 Comp. Gen. 510 also asks that we rule on its other contention. Accordingly, in order to clarify our position in this respect, and since it is not unlikely that this issue could arise again in the future, we have addressed the IRS' other contention as well.

IRS contends that a lender is not a valid assignee under the Act, and is therefore not entitled to the protection provided by the no-set-off clause, if "the notice provisions imposed upon an assignee by the statute were not carried out prior to the Internal Revenue Service's levy and set-off actions." In this respect, 31 U.S.C. § 3727(a)(3) (formerly set forth in substantially the same terms in 31 U.S.C. § 203) provides that assignments to financing institutions are valid if:

> The assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract.

In accordance with this provision, it has consistently been held by our Office (and the courts) that an assignee who does not at least substantially comply with the notice and filing requirements would not have any enforceable rights against the Government under the assignment. 58 Comp. Gen. 619 (1979); B-185962, April 7, 1976; 20 Comp. Gen. 424 (1941); *Uniroyal Inc.* v. *United States,* 197 Ct. Cl. 258, 454 F.2d 1394 (1972); and other cases cited therein. As necessary corollary of that rule, it is also recognized that an assignment does not become effective until the contracting agency (through the contracting or disbursing officer) receives formal written notice of the assignment. 60 Comp. Gen. 510, *supra;* B-177648, December 14, 1973, *supra;* and 29 Comp. Gen. 40 (1949).

The position of the IRS in this respect, however, would require an unwarranted extension of the foregoing principles. That is, the IRS states where a no-set-off clause is included in the contract, a financing institution would "not qualify as an assignee within the meaning of 31 U.S.C. § 203 * * *" if it does not notify the contracting agency of the assignment before the tax levy is filed. We disagree. The Assignment of Claims Act does not specify any period of time within which the contracting officer and disbursing officer must be notified of the assignment. 22 Comp. Gen. 520 (1942). There is absolutely no basis, in our view, for holding that an otherwise proper assignment to an otherwise eligible assignee under a contract containing a no-set-off clause is invalidated because the notice of the assignment was not received by the agency officials prior to the filing of a claim by IRS. That is not to say that the "timing" of the notice is irrelevant where a no-set-off clause is not present. As stated above, the assignment does not become effective until proper notice is received by the contracting agency. Therefore, if the Government has a competing claim against the contract proceeds, the date on which the agency receives notice, while not affecting the basic validity of the assignment, may determine which claim will have priority. However, our Office has consistently held that this is only true if the contract involved does not contain a no-set-off clause. For example, in 56 Comp. Gen. 499 (1977) we said the following in this respect.

> In regard to the priority between this IRS and the assignee, both the courts and this Office have held that *in the absence of a no-set-off provision in the contract, the Government, i.e., the IRS, is entitled to set-off* against the assignee-bank any of its claim against the assignor-contractor which had matured prior to the assignment. [Italic supplied.]

See also B-177648, December 14, 1973; B-170454, August 12, 1970; B-157394, October 5, 1965; B-152008, September 10, 1963; 37 Comp. Gen. 318 (1957); and numerous other cases cited in those decisions.

Conversely, we have consistently held that when a no-set-off clause is included in the assigned contract, neither the IRS or any other Government agency can set off amounts due from the assignor against the contract proceeds owed to the assignee even if the IRS claim matures prior to the date on which the assignment becomes effective, *i.e.*, the date on which notice of the assignment is received by the contracting agency. Our decision in 37 Comp. Gen. 318, *supra,* is precisely on point. In that decision we said the following:

> But for the no-set-off provisions of the Assignment of Claims Act, as amended, we would perhaps agree with the position of the Internal Revenue Service. We think it is clear, however, that that part of the act expressly nullifies the effect of section 6321 of the Internal Revenue Code of 1954, Title 26, in the present case.
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> . . . . . .
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> Other provisions of the Assignment of Claims Act permit the assignment of moneys due under a Government contract which theretofore was prohibited. If the act had permitted only this, without the no set-off provision, an assignee's rights

would be governed by common law. Indeed, this is the situtation where the contract does not include a no set-off provision. In such case, the assignee stands in the shoes of the assignor and the Government may set off against the assignee any claims of the Government against the assignor which had matured prior to the assignment. *South Side Bank & Trust Co.* v. *United States,* 221 F.2d 813. However, under the common law applicable to assignments, debts of the assignor which mature after an assignment is made may not be set off against payments otherwise due the assignee. 20 Comp. Gen. 458, 459, and cases cited there.

These principles are applicable to a Federal tax indebtedness owed by a Government contractor, apart from any lien which may exist. Where the contract does not contain a no set-off provision it may well be that the lien created by section 6321 of the 1954 Internal Revenue Code would prevent the effective assignment of moneys thereafter becoming due the taxpayer under a Government contract. If the assignment of the contract proceeds was made before the tax became due, there would be no property or right to property owned by the taxpayer to which the lien could attach, at least to the extent of the assignee's entitlement to such proceeds.

It is clear that the no set-off provision of the act operated to reduce the Government's common law right of set-off against an assignee. As was stated in *Central Bank* v. *United States,* 345 U.S. 639, 643:

"* * * The Act authorized the War and Navy Departments to limit the Government's previous rights of set-off. * * *

"The Assignment of Claims Act of 1940 was evidently designed to assist in the national defense program through facilitating the financing of defense contracts by limiting the Government's power to reduce properly assigned payments. Borrowers were not to be penalized in security because one contracting party was the Government. Contractors might well have obligations to the United States not imposed by the contract from which the payments flowed, as for example the contractor's income tax for prior earnings under the contract. The taxes here involved are another illustration of the dangers to lenders."

While no mention is made in the Central Bank case of tax debts which might have accrued prior to the making of a Government contract, and as to which a tax lien might have arisen, it is plain that such debts would pose an even greater danger to prospective lenders than tax debts arising during the course of performance of the contract.

In that decision we held that even though the contractor's tax debt arose long before the assignment, and even the execution of the contract, the no-set-off clause precluded the IRS from setting off any of the contractor's tax debts against the contract proceeds (except for any portion of the contract proceeds that may have exceeded the assignor's indebtedness to the assignee). Our Office has reached a similar conclusion in a number of other cases, including the following: B-176905, November 1, 1964; B-166531, November 10, 1969; B-156781, August 4, 1965; B-153171, October 8, 1964; and B-138974, May 23, 1960.

To conclude that whether or not a no-set-off clause is present the Government's set-off authority is to be determined solely on the basis of which claim arose, or became effective first, would nullify the effect and meaning of the no-set-off clause in our view. Accordingly, it remains our position that where a no-set-off clause is present in a contract that is validly and properly assigned to an eligible assignee who substantially complies with the statutory filing and notice requirements, the IRS cannot set off the contractor's tax debt (whether arising under or independently of the assigned contract), against the contract proceeds due the assignee, even if the tax debt was fully mature prior to the date on which

the contracting agency received notice of the assignment.[5] This, of course, would not prohibit set-off if the contracting agency had not been notified of the existence of the prior assignment before the set-off was made (assuming payment was already due under the assigned contract). In this case the contracting agency could not be bound by an assignment of which it was unaware.

We note that B-158451, March 3, 1966, and B-195460, October 18, 1979, in apparent reliance on the conclusion reached in a case in which the contract at issue did not contain a no-set-off clause (37 Comp. Gen. 808 (1958)), concluded that a no-set-off clause did not overcome a Government claim which arose prior to receipt of the notice of assignment. Those decisions are modified to conform to our holding in this case.

[B-208637]

Appropriations—Availability—Intervenors

Section 502 of Nuclear Regulatory Commission fiscal year 1982 appropriation act, which prohibits use of funds to "pay the expenses of, or otherwise compensate" intervenors, prohibits NRC from using 1982 funds to pay Equal Access to Justice Act awards to intervenors, to the extent the underlying proceedings were funded under the 1982 appropriation act. However, 1982 appropriation is available to pay award for fees and expenses incurred incident to that portion of a proceeding funded by a prior year's appropriation not subject to section 502.

Appropriations—Obligation—Attorney Fees

Under section 203 of Equal Access to Justice Act (5 U.S.C. 504) which authorizes agencies to award attorney fees and expenses to prevailing party upon final resolution of adversary adjudication, the obligation for purposes of 31 U.S.C. 1501(a) arises when the agency makes the award, that is, when the adjudicative officer renders his decision in response to the prevailing party's fee application.

Equal Access to Justice Act—Awards, Judgments, etc.—Payment—Permanent Judgment Appropriation

Section 207 of Equal Access to Justice Act (EAJA) (5 U.S.C. 504 note) prohibits use of permanent judgment appropriation established by 31 U.S.C. 1304 as alternative source of funds for payment of awards newly authorized by EAJA unless and until Congress makes a specific appropriation for that purpose.

Matter of: Availability of funds for payment of intervenor attorney fees—Nuclear Regulatory Commission, September 29, 1983:

This responds to a request by the General Counsel of the Nuclear Regulatory Commission (NRC) for answers to a number of questions concerning the availability of appropriated funds for the payment of awards under the Equal Access to Justice Act (Act) to intervenors in NRC adversary adjudications. Most of the questions

[5] We note that this only applies with respect to tax debts, whether arising under or independently of the contract, or other debts that arise independently of the assigned contract. In accordance with the express language of the Assignment of Claims Act, the no-set-off clause does not protect the assignee against set-off by the Government of any non-tax debt that arises under the assigned contract. Moreover, our Office has held that where the claim to be set off is acquired "under the same transaction or contract, the prior notice of assignment does not defeat the right of set off" by the Government. See 46 Comp. Gen. 441, 546 (1966) and 30 *id.* 98 (1950). This is true whether or not the assigned contract contains a no-set-off clause.

center around the issue of whether the NRC may pay such awards in light of section 502 of the agency's fiscal year 1982 appropriation act, the Energy and Water Development Appropriation Act, 1982, Public Law 97-88 (95 Stat. 1135 (1981)). Below, we have stated each question and our answer to it. However, before addressing the specific questions, we believe that a brief discussion of the Act's applicability to intervenors may be helpful.

APPLICABILITY TO INTERVENORS

The Equal Access to Justice Act, Title II of Public Law 96-481, effective October 1, 1981, generally authorizes the awarding of attorney fees, expert witness fees, and other costs to private parties in certain administrative and judicial proceedings against the United States in which they were not previously allowed. Specifically, as relevant to this decision, 5 U.S.C. § 504(a)(1) (added by 203(a)(1) of the Act) provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

The Act defined "adversary adjudication" as "an adjudication under section 554 of this title [Administrative Procedure Act] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C § 504(b)(1)(C). However, according to the legislative history, the exclusion for licensing hearings does not extend to proceedings involving the suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980); S. Rep. No. 253, 96th Cong., 1st. Sess. 17 (1979). (The NRC had indicated informally that it conducts such proceedings in which intervenors participate and in which the position urged by the intervenors might prevail.)

The Act further defines "party" as a party for purposes of the Administrative Procedure Act, but having a net worth under a specified amount or less than 500 employees. 5 U.S.C. § 504(b)(1)(B). This expressly includes a person "admitted by an agency as a party for limited purposes." 5 U.S.C. § 551(3). This language would seem sufficiently broad to encompass intervenors.

This is also the view of the Administrative Conference of the United States although the Conference believes that intervenors will rarely actually receive awards. The conference acts as consultant to Federal agencies which must establish uniform procedures for awarding fees in their administrative proceedings. 5 U.S.C. § 504(c)(1).

The Conference has published model rules to provide guidance to agencies in establishing their own regulations. 46 Fed. Reg. 32900 (June 25, 1981). The comments preceding the model rules state:

Intervenors: The National Screw Machine Products Association, the National Association of Manufacturers, and DOE suggested that the rules should limit or eliminate the eligibility of intervenors. We don't believe that the Act provides for this. We note, however, that situations in which intervenors actually receive awards will probably be rare. The Act excludes rulemaking, licensing, and ratemaking proceedings, in which voluntary intervention is very likely. In adversary adjudications such as enforcement proceedings, intervention by parties without a direct financial stake in the outcome is relatively infrequent, so the Act seems unlikely to become a substantial source of funds for advocacy organizations promoting generalized points of view in agency proceedings. *Id.*, at 32903.

Thus, if an intervenor qualifies as a "prevailing party" in an adversary adjudication as defined in the Act and its legislative history, it is eligible to apply for a fee award under 5 U.S.C. § 504.

THE SPECIFIC QUESTIONS

Against this background, the questions raised by the NRC and our answers to them are are follows:

(1) Does the language of section 502 of the NRC's fiscal year 1982 appropriations measure, Pub. L. No. 97-88, preclude the agency from disbursing NRC fiscal year 1982 appropriated funds to an intervenor who is otherwise found to be entitled to an EAJA award as a prevailing party in an adversary adjudication funded under the fiscal year 1982 appropriations act?

Restated, the question is whether section 502 overrides the more general authority of the Equal Access to Justice Act with respect to NRC proceedings. We believe it does.

The Energy and Water Development Appropriation Act, 1982, appropriated funds to the NRC to carry out its responsibilities under its major authorizing legislation, the Energy Reorganization Act of 1974 and the Atomic Energy Act. Pub. L. No. 97-88, 95 Stat. 1135, 1147 (1981). Since, as will be discussed later, agency funds are at present the sole source for EAJA award payments, funds appropriated by Pub. L. No. 97-88 ordinarily would be available for NRC awards, including those made to intervenors. Section 502, however, limits the availability of the NRC's fiscal year 1982 appropriation with respect to intervenors. It provides:

None of the funds in this Act shall be used to pay the expenses of, *or otherwise compensate*, parties intervening in regulatory or adjudicatory proceedings funded in this Act. 95 Stat. 1148. [Italic supplied.]

We note that the NRC's 1984 appropriation contains the same prohibition. Energy and Water Development Appropriation Act, 1984, Pub. L. No. 98-50 (July 14, 1983), § 502, 97 Stat. 247, 261. The same appropriation act includes a similar prohibition applicable to the Department of Energy. Pub. L. No. 98-50, § 305 97 Stat. 259. The Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1984, also includes a similar provison. Pub. L. No. 98-45 (July 12, 1983), § 410 97 Stat. 219, 239. Thus, the effect of section 502 and similar provisions appears to be a continuing and more general question, apart from the relatively limited scope of the original question NRC raised. While we will respond in terms of NRC's 1982 appropriation, our comments apply

to any agency in any fiscal year in which it is subject to a prohibition like section 502.[1]

We note further that the NRC's "Salaries and Expenses" appropriation for 1982 remains available until expended; that is, it is a no-year appropriation. The same is true for 1984. However, some agencies subject to section 502 or similar restrictions may be operating under one-year appropriations. We will address both situations in the remainder of this decision whenever the distinction is relevant.

The plain terms of section 502, particularly the underscored phrase, unambiguously prohibit the use of appropriated funds for payments of any kind to intervenors. On its face, this would include awards under the EAJA. EAJA payments would constitute a form of compensation to intervenors and are therefore within the scope of the prohibition.

Thus, section 502 prohibits NRC award payments to intervenors while the EAJA appears to provide for such payments; the issue arises as to which statute is controlling. It is a well-settled principle of statutory construction that specific terms covering a given subject matter will prevail over general language of the same or another statute which might otherwise apply. *Kepner* v. *United States,* 195 U.S. 100, 125 (1904); B-152722, August 16, 1965. The EAJA is a general statute. It generally authorizes awards of fees and expenses for prevailing parties in covered proceedings against any governmental agency to which the Act applies. In comparison, section 502 is the more specific provision in that it concerns only payments to intervenors in NRC proceedings funded under the 1982 Energy and Water Development Appropriation Act. Accordingly, section 502 controls and the NRC's 1982 funds are not available to pay intervenor EAJA awards.[2]

(2) To what extent does the language of section 502 of the NRC's fiscal year 1982 appropriations measure, Pub. L. No. 97-88, preclude the agency from disbursing fiscal year 1982 funds to an intervenor as payment of an award for its participation in an adversary adjudication, portions of which were funded under earlier NRC appropriations legislation that did not include the section 502 restriction.

Implicit in this question is the premise that the award is not actually made until fiscal year 1982 or later. This is because the statute does not permit the making of an award prior to final disposition of the adjudication. Also, it should be kept in mind that the following discussion pertains to the NRC, an agency which receives no-year appropriations.

As indicated in our answer to question 1, by enacting section 502, Congress clearly intended to insure that none of the Commission's fiscal year 1982 appropriated funds would be paid to intervenors.

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[1] The relevant provision of the Equal Access to Justice Act, 5 U.S.C. § 504, is subject to a "sunset" provision and is scheduled to expire as of October 1, 1984. Legislation to make the Act permanent has been introduced in the 98th Congress (S. 919) but has not yet been acted upon.

[2] For fiscal year 1983, NRC did not receive a "regular" appropriation but has been operating under a continuing resolution. Pub. L. No. 97-377 (December 21, 1982), § 101(f), 96 Stat. 1830, 1906. It is clear from the conference report that conditions in the 1982 appropriation act were intended to remain applicable. H.R. Rep. No. 980, 97th Cong., 2d Sess. 184 (1982).

In view of the definitive nature of this limitation, we conclude that funds restricted by section 502 may not be used to satisfy an award in an adversary adjudication regardless of the fact that part of the proceeding was conducted in an earlier "unrestricted" fiscal year. Section 502 thus precludes the NRC from disbursing fiscal year 1982 appropriated funds to an intervenor to satisfy an award stemming from participation in an adversary adjudication which was funded in part by an earlier unrestricted appropriation.

On the other hand, the Commission may make and pay such an award from the earlier unlimited appropriation provided funds are still available for obligation from that appropriation at the time the Commission makes its award. An earlier appropriation not limited by section 502 may be used to pay awards to intervenors. The fact that the Commission issues an award during a restricted fiscal year does not prevent its being paid out of a previous fiscal year's appropriation so long as part of the proceeding giving rise to the award was funded by an unrestricted appropriation.[3]

As noted, generally, the Commission annually receives a no-year appropriation which "remains available until expended." For the purposes of determining the availability of funds to make awards of the type in question, the Commission should consider that it obligates its funds in the order in which they are appropriated. Under this approach, the Commission should subtract its total obligations since the effective date of the earlier appropriation from the amount of that appropriation. If the amount of funds obligated is less than the amount of the unrestricted appropriation, then the Commission should consider the difference as the amount of the unrestricted appropriation still available for obligation to pay the award. The award may be satisfied up to the amount of the difference. Conversely, the Commission should consider itself as operating on restricted funds if the obligated amount is greater than the unrestricted appropriation and the award should not be made.

(3) Does the EAJA's alternative provision for payment of an NRC award out of the permanent judgment fund now provide a source of funds in the absence of a specific appropriation to that fund for the payment of EAJA awards?

No. Another provision of the EAJA, section 207 (classified to 5 U.S.C. § 504 note) clearly prohibits the use of the judgment appropriation for the payment of awards unless Congress makes a specific appropriation for that purpose or otherwise amends the legislation.

The "alternative payment provision" refers to the second sentence of 5 U.S.C. § 504(d)(1). Subsection 504(d)(1) provides:

> Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by an agency, the fees and

[3] This of course would not be true if we were dealing with annual appropriations because the prior appropriation would have expired for obligational purposes.

other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

The permanent indefinite appropriation established by 31 U.S.C. § 1304 (formerly 31 U.S.C. § 724a) is generally the source of payment of final judgments covered by 28 U.S.C. § 2414.

In a letter to the Administrative Conference of the United States, B-40342.1, May 15, 1981, we noted that the report of the House Judiciary Committee on the bill that became the Equal Access to Justice Act states "Funds may be appropriated to cover the costs of fee awards or may otherwise be made available by the agency (e.g., through reprogramming)." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 16 and 18 (1980). We concluded that agency operating appropriations were available to pay EAJA awards without the need for specific appropriations.

Read alone, 5 U.S.C. § 504(d)(1) would appear to make the judgment appropriation available as a back-up in limited situations.[4] However, section 207 of the EAJA negates this possibility. Section 207 provides:

> The payment of judgments, fees, and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriation Acts.

The legislative history clearly establishes that section 207 was intended to prevent the expansion of the permanent judgment appropriation. We discussed section 207 and its origin in detail in another letter to the Administrative Conference, B-40342.2, October 21, 1981. The remainder of our response to Question 3 is taken essentially from that letter.

The entire legislative history of section 207 is found in the Congressional Record for October 1, 1980, pages H-10213 through H-10218. (Page references are to the daily edition.)

The conference report on H.R. 5612, which became Pub. L. No. 96-481, was issued on September 30, 1980 (H.R. Rep. No. 96-1434). The conference version of Title II (Equal Access to Justice Act) was identical to the version enacted into law except that it did not include section 207.

The House of Representatives took up its debate on the conference report on October 1, 1980. Representative Danielson raised a point of order, charging that the payment provisions of Title II constituted "an appropriation on a legislative bill, in violation of clause 2 of rule XX of the rules of the House of Representatives." (H-10214). The cited rule prohibits House conferees from agreeing to such a provision without prior authority of the House.

The Chair summarized the provisions in question and then stated:

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[4] The Conference Report on the EAJA stated "The conference substitute directs that funds for an award * * * come first from any funds appropriated to any agency * * *." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 24 and 26 (1980). One of the major concerns leading to the inclusion of the judgment appropriation as a limited back-up was to prevent a small agency from being "disassembled" by a very large award. See Cong. Rec., October 1, 1980 (daily ed.), H-10223 (remarks of Rep. Kasenmeier).

Thus the provision in the Senate amendment contained in the conference report extends the purposes to which an existing permanent appropriation [31 U.S.C. § 1304] may be put and allows the withdrawal directly from the Treasury, without approval in advance by appropriation acts, of funds to carry out the provisions of title II of the Senate amendment. (H-10214)

Accordingly, for the specific reason that the bill would have expanded the availability of the judgment appropriation, the Chair sustained the point of order. Thus, at this point, the bill was dead without some further legislative action.

Representative Smith then offered an amended version of the bill to cure the defect. The Smith amendment was identical to the conference version with the addition of one new section—section 207. Representative Smith explained that his amendment "modifies those provisions which have been ruled to be an appropriation on an authorization bill. It makes no other changes in the language." (H-10218)

Representative Danielson again raised a point of order, contending that the Smith amendment still amounted to an appropriation on a legislative bill. Representative Smith, arguing against the point of order, offered the following explanation:

Mr. Speaker, I think it is very clear the way it [section 207] is worded that it is just an authorization for an appropriation. There has to be a specific appropriation, the same procedure we use in almost all laws around here. (H-10218)

Representative McDade then confirmed Representative Smith's statement, pointing out that section 207 "is boilerplate language." (The language has in fact become very common since enactment of the Congressional Budget Act of 1974, and is usually found in cases of contract authority.)

The Chair then overruled the second point of order, the House accepted the conference report with the Smith amendment after some further debate, and the bill was ultimately signed into law with section 207.

Reviewing this legislative history, it seems clear that the purpose of section 207 was to cure the defect which prompted the Chair to sustain Representative Danielson's first point of order—the expansion of the availability of 31 U.S.C. § 1304. By virtue of section 207, we view the Equal Access to Justice Act as neither expanding nor diminishing the availability of the permanent judgment appropriation.

Accordingly, the alternative payment provision, 5 U.S.C. § 504(d)(1), together with section 207, merely authorizes funds to be appropriated to the judgment appropriation for the payment of EAJA awards. Since this has not been done, the judgment appropriation is not available as a secondary payment source.

(4) If there is no present source of funds for the payment of EAJA awards to NRC intervenors, would an NRC award, issued during a fiscal year in which there is no source of funds, be subject to payment at any time in the future when unrestricted funds are available to the agency or in the permanent judgment appropriation?

The effect of section 502 is to prohibit the obligation of funds for awards to intervenors. At this point, therefore, it is useful to note exactly when an obligation arises under the Equal Access to Justice Act. An award under 5 U.S.C. § 504 is not automatic. Upon final disposition of the adversary adjudication, the party seeking an award must apply to the agency. The application must show that the applicant is a "prevailing party." The agency adjudicative officer must then issue a written decision on the application. An award may be made only if the adjudicative officer finds that the agency's position was not substantially justified and that there are no special circumstances making the award unjust. Also, the award may be reduced or denied if the applicant unduly and unreasonably delayed the final resolution. Under this statutory structure, we think the obligation arises, for appropriations accounting purposes (31 U.S.C. § 1501(a)), when the agency issues its decision on the fee application. See 1 Comp. Gen. 200 (1921); 38 *id.* 338 (1958); B-174762, January 24, 1972.

It is elementary that an appropriation may be obligated only during its period of availability. Thus, an agency with fiscal year funds would record an obligation in the fiscal year in which it makes the award. If the agency is subject to section 502 or a similar provision, it cannot make a valid obligation for a fee award to an intervenor. Since NRC's 1982 appropriation was a no-year appropriation, the unobligated balance continues to be available for obligation. However, section 502 "runs" with the appropriation also without fiscal year limitation, and thus continues to bar the creation of a valid obligation for the prohibited purpose.

Since an agency obligates its appropriations when it makes an award under the EAJA, the answer to Question 4 is that the NRC could not make an award in a fiscal year in which there was no available source of funds for payment. To do so would violate two statutes—31 U.S.C. § 1301(a) (formerly 31 U.S.C. § 628) and the Antideficiency Act, 31 U.S.C. § 1341 (formerly 31 U.S.C. § 665(a)).

The first statute, 31 U.S.C. § 1301(a), restricts the use of appropriations to their intended purposes. An "intended purpose" need not be specified in the appropriation act. It is sufficient that the appropriation be legally available for the item in question. NRC appropriations subject to section 502 are not legally available for EAJA awards to intervenors. Therefore, a purported obligation for such an award would contravene this statute.

The Antideficiency Act prohibits the making of obligations or expenditures in excess of or in advance of appropriations. The applicable principle was stated in a 1981 decision as follows:

> When an appropriation act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in

advance of appropriations made for that purpose. In either case the Antideficiency Act is violated. 60 Comp. Gen. 440, 441 (1981).

It would make no difference whether or not the agency actually recorded the obligation pursuant to 31 U.S.C. § 1501(a). *E.g.*, 55 Comp. Gen. 812, 824 (1976).

If the NRC actually made the award, the effect would be the same as making an obligation after the applicable appropriation has been exhausted. The obligation, albeit an invalid one, is against funds available for obligation at the time it is made. Should appropriations—either NRC appropriations or the judgment appropriation—subsequently become available for EAJA awards to intervenors, they would still not be available to satisfy the prior invalid award unless the legislative action which made those funds available expressed such an intent.

(5) If in answering question 4 you conclude that there is no time limitation on when an award can be paid, can the NRC set a time limitation within which an award must be presented for payment, even if funds are not presently available for disbursement?

In view of our answer to Question 4, a response to this question is unnecessary.

Finally, the NRC asks that we address the same questions as they relate to judicial fee awards under 28 U.S.C. § 2412(d) (added by section 204(a) of the EAJA) to intervenors as a result of their participation in NRC regulatory or adjudicatory proceedings. Judicial awards in this context could come about in one of two ways. First, a party might seek judicial review of the underlying decision of an adversary adjudication. Should the party ultimately prevail, 5 U.S.C. § 504(c)(1) requires that fees be awarded only under the authority of 28 U.S.C. § 2412(d)(3), and the award may encompass the administrative portion of the proceedings. Second, a party might seek judicial review of an agency's determination on its fee application. 5 U.S.C. § 504(c)(2).

Basically, what we have said above with respect to administrative awards applies equally to judicial awards. Agency operating appropriations are available to make payments unless otherwise prohibited, for example, by a provision such as section 502. Also, for the same reasons set forth in our answer to Question 3, section 207 of the EAJA bars payment from the judgment appropriation absent some further congressional action. There is one significant difference, however. A judicial award would not be viewed as violating either 31 U.S.C. § 1301(a) or the Antideficiency Act. Thus, the result might be a valid award with no available source of funds for payment, leaving little recourse but to attempt to obtain funds from the Congress.

In sum, NRC appropriations provided under an appropriation act which contains the section 502 prohibition are not available to pay EAJA fee awards to intervenors, except to the extent the proceedings were funded under an appropriation not subject to the prohibi-

tion. By virtue of section 207 of the EAJA, the permanent judgment appropriation is also not available to pay awards, administrative or judicial, newly authorized by that Act. In the event appropriations—either agency funds or the judgment appropriation—are later made available to pay EAJA awards to intervenors, the applicability to prior time periods would depend on the intent of the legislative action establishing that availability.

[B-196794]

States—Federal Aid, Grants, etc.—Interest on Federal Funds—Accountability

Where subgrantee of CETA grant to State of Arkansas earned interest on recovered FICA taxes before the recovery was returned to the Federal Government, the interest is an applicable credit under the grant agreement and grant cost principles. As a result, all interest earned by subgrantee on the recovery is owed to the grantee and by the grantee to the Department of Labor to the extent not offset by allowable grant costs.

States—Federal Aid, Grants, etc.—Interest on Federal Funds—Accountability

Where a subgrantee of State CETA grantee recovers grant funds and earns interest on recoveries, the interest is not held on advance basis and is not exempt from accountability under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a).

Matter of: Department of Labor—Interest on Recovered Grant Funds, September 30, 1983:

This decision is in response to a request from the Assistant Secretary for Administration and Management, Department of Labor (DOL), for our opinion concerning the treatment of interest earned by a subgrantee on grant funds held under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 801 *et seq.*

The DOL requests that we concur with its position that a subgrantee of a CETA grant to a State cannot retain interest earned on grant funds after they were disbursed and subsequently recovered by the subgrantee. For the reasons given below, we concur with the Department's position.

During the period covering fiscal year 1974 through 1977, DOL made CETA grants to the State of Arkansas (grantee) that in turn made subgrants to the Southeast Arkansas Economic Development District, Inc. (subgrantee). A portion of the grant funds was used by the subgrantee to pay Federal Insurance Contributions Act (FICA) taxes (26 U.S.C. §§ 3101 *et seq.*) to the Internal Revenue Service (IRS). *See* 29 C.F.R. § 98.25(e) (1981). Subsequently, the subgrantee obtained a waiver from IRS of the requirement that it pay FICA taxes and in 1978 the subgrantee received a refund of all of the FICA taxes the subgrantee had paid during the 4-year period in question. The FICA taxes the subgrantee paid to the IRS included both the employer and employee share of the taxes.

Upon receipt of the refund from IRS, the subgrantee invested the money in certificates of deposit. It was not until this situation was revealed through an audit performed by the grantee in September 1980 that the subgrantee returned any of the funds involved to DOL. However, while the subgrantee apparently returned most of the principal to DOL in November 1981, the subgrantee retained accrued interest as well as a portion of the principal that was still owed to the employees the subgrantee had been unable to locate. The latter amount represents the employees' share of FICA taxes that had been withheld from their wages.

The subgrantee cites 59 Comp. Gen. 218 (1980) as authority for its retention of interest on the IRS refund. That decision concluded that non-governmental subgrantees of States were entitled to keep interest earned on grant funds advanced to them by States pending their disbursement for grant purposes under the authority of the Intergovernmental Cooperation Act, 31 U.S.C. § 6503(a). However, as discussed below, the funds at issue here were recoveries of funds previously expended for grant purposes. Hence, they were not advances as that term is defined by relevant implementing regulations, and they should have been applied to grant purposes upon receipt or returned to the Government until needed for grant purposes. More importantly, the recovered funds clearly were not held "pending disbursement" as contemplated by the Intergovernmental Cooperation Act since they were instead invested for a period of years and except for repayments of some employees' shares of the tax refund, neither the refunded amounts nor the investment interest were ever applied to grant purposes.

The Grant Agreement Forms Basis for Treatment of Interest

When a grantee accepts grant funds, it enters into a contractual agreement. 50 Comp. Gen. 470, 472 (1970). This agreement usually is comprised of the grant application, standard Government award documents, special conditions placed on the award, grant manuals provided by the awarding agency, regulations and legislation. Among the fundamental understandings embodied in a grant agreement which flow from the authorizing statute are that grant funds are to be expended only for the purposes for which they were awarded and are not intended to be used for the profit of the grantee unless expressly agreed to or authorized. *See* 42 Comp. Gen. 289 (1962). Accordingly, these funds may not be used for the purpose of earning income where to do so would be inconsistent with the purposes of the grant. Indeed, agencies have no authority to agree to such an arrangement in the absence of some affirmative legislative action permitting them to do so. B-192459, July 1, 1980.

Where, as here, grant funds are invested and earn interest, the treatment of this interest must fall under one of the rules regarding the treatment of grant-related receipts. The regulations recognize three basic categories of receipts: (1) interest earned on grant

funds held in advance of immediate cash needs; (2) grant-related income derived from the grantee carrying out grant purposes; and (3) applicable credits which are those debits and credits to the grant cost items that are incidental to the operation of the grant program but are not the natural outcome of accomplishing grant purposes.

"Applicable credits" are defined as "those receipts or reductions of expenditure-type transactions which offset or reduce expense items allocable to grants as direct or indirect costs." OMB Circular A-87, Attachment A, paragraph C 3 (formerly Federal Management Circular (FMC) 74-4)) incorporated by DOL in 41 C.F.R. § 29-70.103(a) (1982). The circular gives the following examples of "applicable credits" that involve receipts: rebates, recoveries or indemnities on losses; sales of publications, equipment scrap; and income from personal or incidental services. This description of applicable credits has remained consistent in each of the circular's versions from Bureau of the Budget Circular No. A-87 (1968), Attachment A paragraph C 3, through FMC 74-4 (1974), Attachment A, paragraph C 3 to the current OMB Circular A-87, Attachment A, paragraph C 3.

It seems apparent from a review of the three categories of receipts that may come to a grantee or subgrantee that the interest earned in this instance must be classified as an applicable credit. As discussed below, the interest earned on recoveries is not interest earned on an advance of grant funds. Nor does it meet the basic definition of grant income.

First, the refunded amounts themselves clearly are credits because they are "recoveries" under the applicable definition of "credits" and it seems therefore any interest earned on such credits should also be treated as credits. Further, under Treasury Circular 1075 and the Intergovernmental Cooperation Act, as embodied in DOL regulations, grantees are not to hold grant funds in excess of their immediate needs. 29 C.F.R. § 98.2 (1978). By holding recoveries that should either have been re-disbursed for grant purposes or returned to the Government, the subgrantee violated this clear requirement.

As Applicable Credits the Interest Should Have been Applied to Allowable Costs

Under the cost principles applicable to the State under this grant, OMB Circular A-87 (formerly FMC 74-4) Attachment A, paragraph C 1 g, allowable costs are "net of applicable credits." 41 C.F.R. § 29-70.103 (1982). Accordingly, where interest is earned on recoveries of grant funds, this interest must be treated as added to the total amount of grant funds in the grantee's hands. To the extent that the total of grant funds exceeds allowable cost items of the grantee, these funds are returnable to the Federal Government.

The subgrantee, a non-profit organization, was subject, under regulations, in effect when the taxes were recovered, to cost principles applicable to commercial organizations. 29 C.F.R. § 98.12(a) (1977). Under these standards, the subgrantee was required to treat credits as follows:

> The applicable portion of any income, rebate, allowance, and other credit relating to any allowable cost, received by or accruing to the contractor, shall be credited to the Government either as a cost reduction or by cash refund, as appropriate. * * * 41 C.F.R. § 1-15.201-5 (1977).

Based on the foregoing analysis, all the interest earned in this case would appear to be "applicable credits." We can see no basis for making distinctions based on whether interest was earned on funds held "pending disbursement" generally for grant purposes or whether the interest was earned on the employee's share of the tax refund held while attempting to pay employees their share of the recoveries. All of the interest is to be credited to the grant and must be included in arriving at the net allowable costs for the project. Any excess in grant funds over allowable costs is refundable to DOL at the earliest practicable time.

Employees' Share of Recovered Taxes That Has Not Yet Been Paid to Them Should Be Returned to the Federal Government

Cost regulations are also the basis for answering who should hold the employee share of the IRS refund that has not been returned to the employees. Clearly there is an obligation under this grant to pay these employees for the portion of the refunded taxes that they contributed, but the grantee is entitled to keep only those funds that represent actual costs to him. At this late date, whether these funds will ever be paid must be seriously doubted. Accordingly, they do not appear allowable under grant closeout procedures and this amount should be disallowed as a grantee allowable cost pending submission by an ex-grant funded employee of a request for payment. *See* 29 C.F.R. § 98.17 (1977); under 1982 DOL regulations, closeout procedures are reserved for 41 C.F.R. § 29-70.212. At this time we do not believe that amounts representing employees' share of the refunded amounts are encumbered sufficiently to permit retention as an allowed cost. Adjustments among DOL, the grantee and the subgrantee can be made at a later time, if individuals' claims are submitted, since their payment would represent costs incurred out of grant funds that were available for this purpose at the time the obligation was made.

Section 203 of the Intergovernmental Cooperation Act Does Not Apply to Interest Earned on Recoverd Grant Funds

On several occasions, going back as far as the first volume of Comptroller General decisions, we have considered situations where grantees have earned interest on advances of grant funds. *See* 1 Comp. Gen. 652 (1922). These cases established the rule that where grantees earn interest on advances of grant funds held pend-

ing disbursement they hold that interest in trust for the Government and must pay it over to the Government. *See, e.g.,* 42 Comp. Gen. 289 (1962). Section 203 of the Intergovernmental Cooperation Act of 1968, 31 U.S.C. § 6503(a) (formerly 42 U.S.C. § 4213), made an express exception to this rule for States. Under this Act, States cannot be required to account to the Federal Government for interest earned on grant funds held pending their disbursement. *Id.* We have said that interest earned by subgrantees on advances from State grantees held pending disbursement are also excepted by operations of this Act. 59 Comp. Gen. 218 (1980). The subgrantee argues that our ruling in the last cited case controls the question presented here by DOL because the amounts refunded by IRS were being held "pending disbursement" and that, accordingly, the subgrantee should be allowed to retain the interest.

The Intergovernmental Cooperation Act of 1968, as codified in 1982, provides as follows:

> (a) Consistent with program purposes and regulations of the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after the transfer. A State is not accountable for interest earned on grant money pending its disbursement for program purposes. 31 U.S.C. § 6503(a).

The last sentence of this provision which provides the basis for the interest exemption for States and their subgrantees from our general rule does not mention the "advance" of funds. However, it is clear from the sentence that precedes it, which speaks about minimizing the time between the transfer and disbursement by a grantee, that the provision applies to advances of funds to States. This conclusion is expressly described in the legislative history of this section.

> This section establishes a procedure *to discourage the advancement of Federal funds for longer periods of time than necessary.* The Department of the Treasury has already moved administratively to achieve this objective in its Departmental Circular No. 1075, issued May 28, 1964. Under this circular, a letter of credit procedure has been established which maintains funds in the Treasury until needed by recipients. *Advances* are limited to the minimum allowances that are needed and are timed to coincide with actual cost and program requirements. This section is designed to place this administrative practice on a legislative basis and to extend it to cover disbursements which occur both prior and subsequent to the transfer of funds. *It is further intended that States will not draw grant funds in advance of program needs.*
>
> Decisions of the Comptroller General of the United States have in the past required that recipients of Federal grants return to the Treasury any interest earned on such grants prior to their use, unless Congress has specifically precluded such a requirement. The new technique, such as the letter of credit and sight draft procedures now used by the Treasury, should minimize *the amount of grants advanced,* and thus it should not be necessary to continue to hold States accountable for interest or other income earned prior to disbursement. S. Rept. No. 1456, 90th Cong. 15. [Italic supplied.]

Moreover, it is unlikely that Congress, in creating an exception from the general rule on interest established by Comptroller General decisions, would have created an exemption that would go

beyond the scope of that rule. The legislative history, as quoted above, confirms the limited problems addressed by section 203.

This interpretation of our cases and the Intergovernmental Cooperation Act has formed the basis for governmental policy for many years. OMB Circular A-102 provides at Attachment E, paragraph 2 as follows:

> *Interest earned on advances* of Federal funds shall be remitted to the Federal agency except for *interest earned* on advances to States or instrumentalities of a State as provided by the Intergovernmental Cooperation Act of 1968 (Public Law 90-577) * * *. [Italic supplied.]

This provision has been in the circular in substantially the same form since 1972. DOL has adopted this policy by regulation. *See, e.g.,* 29 C.F.R. § 98.19 (1974) and 41 C.F.R. § 29-70.205-2 (1982). As indicated, we read the Intergovernmental Cooperation Act to be directed to a specific situation concerning the cash flow management problem associated with "advances." Situations, such as that presented by this subgrantee, where disbursements are later recovered, neither meet the wording of the Intergovernmental Cooperation Act, nor are they the kind of situations it was designed to address. Accordingly, the exemption for interest earned on advances to States contained in the Intergovernmental Cooperation Act does not apply to the recoveries from IRS in this case. Our cases interpreting section 203 of the Intergovernmental Cooperation Act, as extending to subgrantees of States, are therefore not on point and do not govern the result of this case.

CETA Section 112(c)

Finally, DOL has specifically asked in the context of this case whether section 112(c) of CETA, formerly set forth in 29 U.S.C. § 822(c), would provide a basis for saying that the subgrantee cannot be said to have always held the recovered withholding taxes pending disbursements since the time within which the grantee could re-spend the recoveries had apparently expired under section 112(c) while interest was being earned. There is no need to address this issue since whether the subgrantee was holding the funds "pending disbursement" is not a material question under this decision as to whether the interest earned by the subgrantee should be paid over to the Federal Government.

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Restrictions
Buy American requirement
Specialty metals' procurements. (*See* APPROPRIATIONS, Defense Department, Restrictions, Specialty metals' procurements)
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ARCHITECT AND ENGINEERING CONTRACTS (*See* CONTRACTS, Architect, engineering, etc. services)

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ARMS EXPORT CONTROL ACT. (*See* **FOREIGN GOVERNMENTS, Defense articles and services, Arms Export Control Act)**

ASSIGNMENT OF CLAIMS

Contracts

Payments. (*See* **CONTRACTS, Payments, Assignment)**

ATTORNEYS

Fees

Civil Service Reform Act of 1978

Payment in the interest of justice

Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-filed application for disability retirement. *David G. Reyes,* B-206237, August 16, 1982. Claim for reasonable attorney fees under the Back Pay Act, 5 U.S.C. 5596, as amended, is allowed since General Accounting Office, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 C.F.R. 550.806 464

Reasonableness of fees claimed

Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality 464

Equal Access to Justice Act

Appropriation availability

Section 502 of Nuclear Regulatory Commission fiscal year 1982 appropriation act, which prohibits use of funds to "pay the expenses of, or otherwise compensate" intervenors, prohibits NRC from using 1982 funds to pay Equal Access to Justice Act awards to intervenors, to the extent the underlying proceedings were funded under the 1982 appropriation act. However, 1982 appropriation is available to pay award for fees and expenses incurred incident to that portion of a proceeding funded by a prior year's appropriation not subject to section 502 692

Under section 203 of Equal Access to Justice Act (5 U.S.C. 504) which authorizes agencies to award attorney fees and expenses to prevailing party upon final resolution of adversary adjudication, the obligation for purposes of 31 U.S.C. 1501(a) arises when the agency makes the award, that is, when the adjudicative officer renders his decision in response to the prevailing party's fee application 692

Recovery of fees, etc. incurred in pursuing bid protest

Not authorized by Act

Adversary adjudication requirement

Recovery under the Equal Access to Justice Act of attorney's fees and costs incurred in pursuing a bid protest at General Accounting Office (GAO) is not allowed because GAO is not subject to the Administrative Procedures Act (APA) and in order to recover under Equal Access to Justice Act claimant must have prevailed in an adversary adjudication under the APA 86

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Fees—Continued

Reasonableness of fees claimed

Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality 464

AWARDS

Incentive

Government Employees Incentive Awards Act

Status of cash awards

Vested right of employee

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e-16(b). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against back pay since such an offset would contravene the make-whole purposes of 42 U.S.C. 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded 343

BIDDERS

Qualifications

Prior unsatisfactory service

Contracting officer's nonresponsibility determination based on data supplied by the contracting office, which showed protester delinquent on 70 percent of contract line items, and by the Defense Contract Administration Services Management Area (DCASMA), which showed protester delinquent on 26 percent of contracts due, was reasonable notwithstanding fact that some of the delinquencies may arguably have been agency's fault 213

Responsibility of contractor. (*See* **CONTRACTORS, Responsibility, Determination**)

Security clearance. (*See* **CONTRACTORS, Responsibility, Administrative determination, Security clearance**)

Small business concerns. (*See* **CONTRACTS, Small business concerns, Awards**)

Responsibility *v.* bid responsiveness

Bond requirements

Agency's rejection of low bid as nonresponsive, because individual sureties submitted on a bid bond pledged the same assets, was improper where affidavit submitted disclosed a net worth which was more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond and where bid bond was legally sufficient to establish the joint and several liability of the sureties. Furthermore, Defense Acquisition Regulation 10-201.2 does not require that the two sureties have two separate pools of assets 615

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Union agreements, labor strife avoidance, etc.
Requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions neither unduly restricts competition nor conflicts with Federal norm so long as prime contractor permits nonunion firms to compete for contracts and affords them opportunity to seek prehire agreements under the National Labor Relations Act. B-204037, Dec. 14, 1981, is amplified..... 428

BIDS
Acceptance time limitation
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A Standard Form 33 solicitation provision which provides that a 60-day bid acceptance period will apply unless the bidder specifies a different number of days should have been cross-referenced with another solicitation provision which provides that bids with acceptance periods of fewer than 45 days would be considered nonresponsive. The failure to cross-refer was not in this case grossly misleading and, therefore, the cancellation of the solicitation is not required 31
Bonds. (*See* **BONDS, Bid**)
Buy American Act. (*See* **BUY AMERICAN ACT**)
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Lacking
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An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the incumbent contractor, one of which an audit has called into question, and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage..... 65
Late bid
Bid that was timely submitted at the place designated for receipt of bids, but was improperly returned to the bidder's possession where it remained until several minutes after the time set for opening of bids, may be considered for award where the bid was in a sealed envelope, the bidder possessed the bid for only 10 minutes, there was no suggestion that the bid was altered, and the bid was returned to the Government's possession prior to the opening of any bid; consideration of the bid would not compromise the integrity of the competitive bidding system 196
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Bid stating that country of manufacture is "USA/England" was correctly evaluated as offering foreign end product for purposes of applying Buy American Act because the bid can reasonably be construed to permit the bidder to furnish either a domestic or a foreign product in the event of award 154

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An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the incumbent contractor, one of which an audit has called into question, and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage 65
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Agency refusal to consider prompt-payment discount in bid evaluation is proper where solicitation incorporates revision to Defense Acquisition Regulation which precludes consideration of such discounts 474
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Construction contracts under $25,000
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The Miller Act as amended, 40 U.S.C. 270a, does not preclude the General Services Administration from requiring bid guarantees in connection with bids for construction contracts under $25,000 210
Interpretation. (*See* BIDS, Construction)
Invitation for bids
Ambiguous
Invitation for bids (IFB) which specified class "A" security guards but contained Service Contract Act Wage Determination for class I and class II security guards was ambiguous and should have been amended. However, where the record indicates that no bidders were prejudiced by the ambiguity and the Government will receive the desired services, no "cogent and compelling reason" exists for cancellation of the IFB and resolicitation 354
Service Contract Act provisions
Our Office will consider a protest alleging terms of a solicitation to be defective although those terms concern the Service Contract Act, the enforcement of which is under the jurisdiction of the Department of Labor 354
Amendments
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Wage determination changes
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When union contract would require offeror to pay wages in excess of rates determined under Davis-Bacon Act, and acceptance of bid which failed to acknowledge amendment containing wage determination clearly has no prejudicial effect on competition, offeror may be permitted to cure defect by agreeing to amendment after bid opening 111

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Cost comparison solicitation. (*See* **CONTRACTS, In-house performance *v.* contracting out, Cost comparison, Cancellation of solicitation)**
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Specialty metals' procurements

Agency properly canceled solicitation after bid opening where bidders might have offered unacceptable foreign specialty metal products relying on a clause in the solicitation which no longer accurately reflected the agency's interpretation of applicable law, because the solicitation, as written, failed to reflect the Government's needs. 49 Comp. Gen. 606 is distinguished 256

Clauses
Inspection of Services
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Reconcilability

Performance Requirements Summaries in IFBs for services contracts which permit the Government to deduct amounts from the contractor's payments for unsatisfactory services do not conflict with any reperformance rights of the contractor. Although the standard "Inspection of Services" clause permits the Government to require reperformance at no cost to the Government, the protester had failed to show that defective services may be reperformed without the Government receiving reduced value 219

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Estimates of Government
Faulty. (*See* **BIDS, Estimates of Government, Faulty, Cancellation of invitation)**
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Evaluation mainly based on factors other than price

An invitation for bids which states that in the evaluation for award the bidders' "technical submittals" will be weighted at 80 percent and cost 20 percent is improper because award under this evaluation scheme could be made to a bidder other than the one which bid the lowest price. A formally advertised contract must be awarded on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder is responsible 458

Interpretation
"Estimated Quantities" provision

The contracting officer reasonably interpreted a clause, which provided that bids offering less than 75 percent of the estimated requirements would not be considered, as referring to the estimated number of hours listed for each item and not to the number of items listed on the invitation for bids 196

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Domestic product preference
Statutory exceptions
Failure to reference in invitation
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Administrative determination
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Protest that agency solicitation for carousel-type automated storage and retrieval system unduly restricts competition is without merit where record shows that agency technical personnel had an opportunity to evaluate the relevant characteristics of the available systems and reasonably determined that the carousel-type system was the only system that could meet its minimum needs and the protester has not shown that the agency's determination was unreasonable 503
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Commercial carrier
Failure to deliver to designated office
Government did not frustrate carrier's ability to deliver bid package where commercial carrier that contracted with protester to deliver bid to office designated in the solicitation instead asked an agency employee—who was not affiliated with the contracting activity—to deliver an unmarked package containing protester's bid. 57 Comp. Gen. 119 and B-202141, June 9, 1981, are distinguished 148
Mishandling determination
Improper Government action
Not primary cause of late receipt
Hand carried delay
Where carrier for its own convenience gives an unmarked package containing protester's bid to an agency employee rather than delivering it to the proper office, subsequent misrouting of bid by another agency employee was not the paramount reason for the late arrival of the bid at the contracting office and bid was properly rejected 148

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Preparation
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Claim for bid preparation costs is denied where the claimant has not shown that agency has abused its discretion in canceling the solicitation 129
Qualified
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Progress payment
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Bid responsive
Military procurement
Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire. 45 comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases modified in part 113
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Failure to comply with "union-only" requirement
Requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions neither unduly re-

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Failure to comply with "union-only" requirement—Continued
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"Estimated Quantities" provision
Interpretation
The contracting officer reasonably interpreted a clause, which provided that bids offering less than 75 percent of the estimated requirements would not be considered, as referring to the estimated number of hours listed for each item and not to the number of items listed on the invitation for bids..... 196
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Timely receipt
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Agency error
Resubmission after bid opening time
Hand-carried bid
Bid that was timely submitted at the place designated for receipt of bids, but was improperly returned to the bidder's possession where it remained until several minutes after the time set for opening of bids, may be considered for award where the bid was in a sealed envelope, the bidder possessed the bid for only 10 minutes, there was no suggestion that the bid was altered, and the bid was returned to the Government's possession prior to the opening of any bid; consideration of the bid would not compromise the integrity of the competitive bidding system..... 196
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BONDS
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More than one
Pledging same assets
Propriety
Agency's rejection of low bid as nonresponsive, because individual sureties submitted on a bid bond pledged the same assets, was improper where affidavit submitted disclosed a net worth which was more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond and where bid bond was legally sufficient to establish the joint and several liability of the sureties. Furthermore, Defense Acquisition Regulation 10–201.2 does not require that the two sureties have two separate pools of assets..... 615

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Contract price limitation
Pub. L. 95-585 amendment effect
Construction contracts under $25,000
Exemption status
The Miller Act as amended, 40 U.S.C. 270a, does not preclude the General Services Administration from requiring bid guarantees in connection with bids for construction contracts under $25,000 210
Performance
Surety
Entitled to recover without set-off
Recovery not affected by mistaken overpayment of contractor
Under surety law surety has election to pay Government's excess cost of completing contract or undertaking to finish the job himself. Under latter election, surety, upon successful completion, is entitled to his costs, up to the unexpended balance of the contract. In considering amount of unexpended balance available to pay performance bond surety his costs for completion of a defaulted National Institutes of Health contract, Government must consider contract balance to include amount of the Government's previous mistaken overpayment to the contractor 498

BUY AMERICAN ACT
Bids
Evaluation
Domestic product proposed
Responsibility determination
Not required
Protest that Buy American Act evaluation should not have been conducted because sole domestic bid, which was not low, was, allegedly, bogus is rejected. Bogus charge relates to allegation concerning domestic bidder's alleged nonresponsibility. But Buy American regulatory scheme does not require responsibility determination of domestic bidder in this situation. Moreover, General Accounting Office does not consider that a responsibility determination need be made absent collusion or other extraordinary circumstances not present in this procurement. Finally, domestic bid contained no indication that it was other than domestic 345
Foreign country classification
Not prejudicial to protester
Protester was not prejudiced by classfication of foreign countries involved in Buy American evaluation of bids submitted for requirement of hexachlorethane 345
Inapplicability of Buy American Act evaluation factor
Quantities on which only foreign bids submitted
Sole domestic bidder submitted bid for quantity which was less than maximum specified in Invitation For Bids (IFB). Partial bid was authorized by IFB. Contracting officer applied Buy American Act evaluation factor against nondomestic bidder as to maximum quantity which nondomestic bidder bid on. Application of evaluation factor as to quantities on which domestic bidder submitted partial bid was

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Bids—Continued
Evaluation—Continued
Inapplicability of Buy American Act evaluation factor—Continued
Quantities on which only foreign bids submitted—Continued
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Domestic or foreign product
Country of manufacture
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Slash (/) usage
Bid stating that country of manufacture is "USA/England" was correctly evaluated as offering foreign end product for purposes of applying Buy American Act because the bid can reasonably be construed to permit the bidder to furnish either a domestic or a foreign product in the event of award 154

CERTIFYING OFFICERS
Submission to Comptroller General
Items of $25 or less
Claims amounting to $25 or less should normally be handled by certifying and disbursing officers under procedures authorized in letter of July 14, 1976, and need not be submitted to the Comptroller General for decision. B-189622, Mar. 24, 1978, is distinguished 168

CHECKS
Altered by payee
Disbursing officers' responsibility. (*See* DISBURSING OFFICERS)
Duplicate. (*See* CHECKS, Substitute)
Overpayments
Relief to Treasurer of U.S. (*See* TREASURY DEPARTMENT, Treasurer of United States, Relief)
Payees
Deceased
Heirs' claim
Fact of possession
Insufficient to support payment
Claimants assert entitlement to proceeds of 13 Treasury checks issued in 1936 and 1937. Original payee died in 1954. Payee had endorsed one check incident to unsuccessful attempt to negotiate it in 1939, but other 12 were unendorsed. Checks were found among personal effects of payee's nephew, who was not a legatee under payee's will and who died in 1979. Claimants are heirs of nephew. Mere fact of possession does not establish *inter vivos* gift or other basis of entitlement, and record contains no evidence of delivery of checks by

CHECKS—Continued Page
Payees—Continued
Deceased—Continued
Heirs' claim—Continued
Fact of possession—Continued
Insufficient to support payment—Continued
payee to nephew. Therefore, General Accounting Office finds no basis to allow claim, under either Uniform Commercial Code or relevant state law 121
Personal
Bid desposits. (*See* **SALES, Bids, Deposits**)
Substitute
Replacement of lost or stolen checks
Treasurer's responsibility
Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general, General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527 (c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted 91

CIVIL RIGHTS ACT
Title VII
Discrimination complaints
Informal agency settlement
Without discrimination finding
Backpay
Agencies have the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination under EEOC regulations and case law. Title VII of the Civil Rights Act of 1964, as amended, and EEOC regulations issued thereunder provide authority for agencies to award backpay to employees in discrimination cases, independent of the Back Pay Act, 5 U.S.C. 5596. Thus, backpay is authorized under Title VII without a finding of an "unjustified or unwarranted personnel action" and without a corresponding personnel action 239
Cash award limitations
Informal settlements without a specific finding of discrimination are authorized by Title VII of the Civil Rights Act of 1964, as amended. In such informal settlements Federal agencies may authorize backpay awards, attorney fees, or costs without a corresponding personnel action. However, agencies are not authorized to make awards not related to backpay or make awards that exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made. An award may not provide for compensatory or punitive damages as they are not provided under Title VII 239

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CIVIL SERVICE REFORM ACT OF 1978

Attorney fees. (*See* **ATTORNEYS, Fees**)

Grade retention *v.* pay retention

Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay* retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information submitted, by 63 Comp. Gen. ——— (B-209414, Dec. 7, 1983)... 151

CLAIMS

Assignments

Contracts

Payments. (*See* **CONTRACTS, Payments, Assignment**)

Set-off. (*See* **SET-OFF, Contract payments, Assignments**)

Attorneys' fees. (*See* **ATTORNEYS, Fees**)

By or against Government

Record retention until settlement. (*See* **RECORDS, Retention**)

Federal Claims Collection Act of 1966. (*See* **FEDERAL CLAIMS COLLECTION ACT OF 1966**)

Reporting to Congress

Meritorious Claims Act

Reporting not warranted

The Secretary of the Army denied a deceased civilian employee's representative's claim under 10 U.S.C. 2733 for wrongful death damages allegedly caused by malpractice of Army medical officials. As to the Comptroller General reporting the matter to Congress as a meritorious claim under 31 U.S.C. 3702(d) (formerly 31 U.S.C. 236), that provision is construed to apply only to claims which fall within General Accounting Office's (GAO) settlement authority. Since, under 10 U.S.C. 2733 and 2735, the Army's settlement of a claim for damages is final and conclusive, GAO has no authority in the matter and the claim is inappropriate for reporting to Congress under the Act..... 280

Statutes of limitation. (*See* **STATUTES OF LIMITATION, Claims**)

Transportation

Settlement

Contract Disputes Act effect. (*See* **CONTRACTS, Contract Disputes Act of 1978, Inapplicability, Matters covered by other statutes, Transportation Act**)

CLOTHING AND PERSONAL FURNISHINGS

Special clothing and equipment

Air purifiers (ecologizer)

Purchase of air purifiers that would clean the air of tobacco smoke in Department of Interior public reading room does not violate rule against purchasing equipment for personal benefit of individual employees, since all employees and members of public who use the room would benefit. 61 Comp. Gen. 634 is distinguished..... 653

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COLLECTIONS

Debt. (*See* DEBT COLLECTIONS)

COMMERCE DEPARTMENT

Economic Development Administration

Loan guarantees

Public Works and Economic Development Act

Defaulted loans

Loan collection process

The Economic Development Administration (EDA) has the authority to sell defaulted loans to borrowers for less than the unpaid indebtedness. EDA's authority under 42 U.S.C. 3211(4) and 19 U.S.C. 2347(b)(2) to compromise loans allows it to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, if EDA determines it is in the Government's interest to do so because of some doubt as to the borrower's liability or the collectibility of the full amount of the loan. However, it is not required to do so if it determines that allowing borrowers to bid on their own obligations would interfere with the integrity of the loan collection process or for other valid reasons 489

COMPENSATION

Aggregate limitation

Compensatory time. (*See* LEAVES OF ABSENCE, Compensatory time, Aggregate salary limitation)

Backpay

Removals, suspensions, etc. (*See* COMPENSATION, Removals, suspensions, etc., Backpay)

Retroactive promotions

Computation

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e-16(b). Under regulations implementing sec. 2000e-16(b), set forth in 29 C.F.R. 1613.271(b)(1), back pay must be computed in the same manner as if awarded pursuant to the Back Pay Act, as amended, 5 U.S.C. 5596, and its implementing regulations set forth in 5 C.F.R. 550.805. The standards for computing back pay must be applied in light of the make-whole purposes of 42 U.S.C. 2000e-16(b) 343

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e-16(b). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against back pay since such an offset would contravene the make-whole purposes of 42 U.S.C. 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded 343

COMPENSATION—Continued Page

Collective bargaining agreements

Arbitration decisions, etc.

Implementation

General Accounting Office jurisdiction

Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to General Accounting Office (GAO) and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter 274

Double

Severance pay

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a) 435

Downgrading

Saved compensation

Entitlement

An employee seeks a Comptroller General decision on his entitlement to salary retention. The General Accounting Office (GAO) adheres to the doctrine of *res judicata* to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the GAO. 47 Comp. Gen. 573. Since in *William C. Ragland* v. *Internal Revenue Service,* Appeal No. 55-81 (C.A.F.C. November 1, 1982), it was previously decided that the employee was not entitled to saved pay benefits, the GAO will not consider his claim for salary retention 399

Holidays

Leave without pay status

Before and after holiday

Gradual Retirement Plan participation

A regularly scheduled full-time employee participated in one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 and B-206655, May 25, 1982, are distinguished 622

Hours of work

Fair Labor Standards Act

Overtime computation. (*See* **COMPENSATION, Overtime, Fair Labor Standards Act, Hours of work requirement**)

COMPENSATION—Continued Page

Judges

Federal. (*See* **COURTS, Judges, Compensation**)

Overpayments

Waiver. (*See* **DEBT COLLECTIONS, Waiver**)

Overtime

Backpay. (*See* **COMPENSATION, Removals, suspensions, etc., Backpay, Overtime, etc. inclusion**)

Early reporting and delayed departure

Lunch period, etc. setoff

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. *Baylor* v. *United States,* 198 Ct. Cl. 331 (1972) 447

Fair Labor Standards Act

Early reporting and/or delayed departure

Lunch period, etc. setoff

***Bona fide* break requirement**

The Office of Personnel Management (OPM) has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no *bona fide* lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.,* for hours worked in excess of 40 in a week as no offset for lunch breaks may be made 58

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are *bona fide*—although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are *bona fide* 447

Effect

Firefighters. (*See* **COMPENSATION, Overtime, Firefighting, Fair Labor Standards Act**)

Hours of work requirement

Paid absences

Not hours of work

Under FLSA, overtime is computed on basis of hours in excess of 40-hour workweek, as opposed to 8-hour workday. Additionally, paid

COMPENSATION—Continued Page
Overtime—Continued
Fair Labor Standards Act—Continued
Hours of work requirement—Continued
Paid absences—Continued
Not hours of work—Continued
absences are not considered "hours worked" in determining whether employee has worked more than 40 hours in a workweek 187
Recordkeeping requirement
Noncompliance effect
Where an agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitations, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies 42
Employee's evidence
Where agency has failed to record overtime hours as required by Fair Labor Standards Act (FLSA), and where supervisor acknowledges overtime work was performed, employee may prevail in claim for overtime compensation for hours in excess of 40-hour workweek on the basis of evidence other than official agency records. In the absence of official records, employee must show amount and extent of work by reasonable inference. List of hours worked submitted by employee, based on employee's personal records, may be sufficient to establish the amount of hours worked in absence of contradictory evidence presented by agency to rebut employee's evidence 187
Statute of limitations
Employee who was previously awarded backpay for overtime work performed from June 23, 1974, through Jan. 4, 1976, seeks additional compensation for overtime work from Jan. 4, 1976, through June 17, 1978. Since prior claim was filed in General Accounting Office (GAO) on July 15, 1980, portion of claim arising before July 15, 1974, should not have been considered by agency since Act of Oct. 9, 1940, as amended, 31 U.S.C. 3702(b)(1), bars claim presented to GAO more than 6 years after date claim accrued. Therefore, agency should offset amount of prior erroneous payment against amount now due to employee 187
"Suffered or permitted" overtime
Agency directive against overtime
Enforcement requirement
Where employee has presented evidence demonstrating that she performed work outside her regular tour of duty with the knowledge of her supervisor, the fact that agency sent her a letter directing that she not perform overtime work does not preclude her from receiving compensation under the FLSA for such work actually performed. Despite its admonishment, agency must be said to have "suffered or permitted" employee's overtime work since supervisor allowed em-

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Overtime—Continued
Fair Labor Standards Act—Continued
"Suffered or permitted" overtime—Continued
Agency directive against overtime—Continued
Enforcement requirement—Continued
ployee to continue working additional hours after employee had received, but had failed to comply with, agency's directive 187
Firefighting
Fair Labor Standards Act
Court leave
Jury duty
Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay 216
Meal time
Under 4 C.F.R. 22.8 (1983) General Accounting Office (GAO) will not take jurisdiction over a labor-management matter which is "unduly speculative or otherwise not appropriate for decision." Since this case is based on factual issues which are irreconcilably in dispute, it would be more appropriately resolved through the grievance procedures set forth in the parties' negotiated labor-management agreement, or through negotiation. Therefore, under 4 C.F.R. 22.8, GAO will exercise its discretion to decline jurisdiction in this matter . 537
Panama Canal employment system
Retroactive increases
Authority to implement
The Assistant Secretary of the Army (Civil Works) questions whether he is authorized by section 1225(b)(2) of the Panama Canal Act of 1979 to retroactively implement an increase in the wages of employees of Federal agencies participating in the Panama Canal Employment System. We hold that the wage increase may not be effected retroactively because section 1225(b)(2) of the Panama Canal Act, authorizing annual wage increases, does not specifically provide for the retroactive implementation of such increases. Absent specific statutory authority, pay increases resulting from the exercise of discretionary administrative authority may be implemented on only a prospective basis 605
Periodic step-increases
Waiting period
Repromotion
During period of grade retention
Civil Service Reform Act of 1978
Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay*

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Periodic step-increases—Continued
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Repromotion—Continued
During period of grade retention—Continued
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retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information furnished, by 63 Comp. Gen. ——— (B-209414, Dec. 7, 1983).... 151
Premium pay
Federal Aviation Administration employees. (*See* FEDERAL AVIATION ADMINISTRATION)
Removals, suspensions, etc.
Backpay
Entitlement
Alternative employment offered
Effect of refusal to accept offer
Agency denied backpay for a portion of employee's involuntary separation since he had refused an offer of temporary employment during his appeal to the Merit Systems Protection Board, and also because he did not show he was ready, willing, and able to work during that period. Employee, however, was not obligated to accept alternate employment while administrative appeals were pending. Further, no evidence shows that employee's medical condition during that period differed from his medical condition during the period for which he was awarded backpay. Accordingly, employee's claim for additional backpay is granted, with appropriate adjustments in annual and sick leave 370
Overtime, etc. inclusion
Two employees were awarded backpay pursuant to a Dec. 10, 1973 ruling by the Board of Appeals and Review of the Civil Service Commission that they had involuntarily resigned from their positions in 1972. The employees' claims that overtime earnings were improperly deducted from their backpay awards were received in this Office on June 16 and July 14, 1980. The claims may not be allowed since they accrued on Dec. 10, 1973, the date of the Board's determination, and 31 U.S.C. 71a (1976) (now sec. 3702) bars consideration of claims received in this Office more than 6 years after the date the claim first accrues. 61 Comp. Gen. 57 is amplified 275
Computation method
Agency determination
Employee claims that he is entitled to additional overtime pay as part of his backpay award based on overtime hours worked by other employees during period of his separation. Agency based overtime payment on amount of overtime worked by the employee during preceding year. Based on the facts presented, this Office cannot say that the formula used by the agency in computing his entitlement to overtime is incorrect. Employee's claim for additional overtime in this respect is denied 370
Saved
Downgrading actions. (*See* COMPENSATION, Downgrading, Saved compensation)

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Senior Executive Service. (*See* OFFICERS AND EMPLOYEES, Senior Executive Service)
Severance pay
Eligibility
Actual separation requirement
Certain HUD employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be be actually separated from United States Government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board 435
Agency determination
Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a) 435
Involuntary separation
Religious reasons
A National Guard member was denied reenlistment as a result of his refusal to attend training drills on Saturdays which required his removal as a civilian National Guard technician. He was denied severance pay on the ground of delinquency in refusing to work on Saturdays. We hold that he is entitled to severance pay under 5 U.S.C. 5595 because his refusal to attend Saturday drills based on his religious beliefs was not delinquency within the meaning of the statute. See *Sherbert* v. *Verner,* 374 U.S. 398 (1963) 625
Involuntary separation requirement
Resignation incident to RIF
Cancellation of RIF prior to effective date of resignation
Federal Trade Commission (FTC) announced that it was closing several regional offices, and employees of these offices were given specific notice that their jobs would be abolished pursuant to a reduction-in-force (RIF). After several employees submitted written resignations, the FTC reversed its decision, did not close the regional offices, and canceled the RIF. The employees separated from service after the RIF was canceled. Hence, they are not entitled to severance pay since their resignations were voluntary and could have been withdrawn. Civil Service Regulations state that employees are not eligible for severance pay if at the date of separation they decline an

COMPENSATION—Continued Page
Severance pay—Continued
Eligibility—Continued
Involuntary separation requirement—Continued
Resignation incident to RIF—Continued
Cancellation of RIF prior to effective date of resignation—Continued
offer of an equivalent position in their commuting area, and the option to remain in the same position is equally preclusive. 5 C.F.R. 550.701(b)(2) 171
Within-grade increases. (*See* COMPENSATION, Periodic step-increases)

COMPREHENSIVE EMPLOYMENT AND TRAINING ACT. (*See* GRANTS, Comprehensive Employment and Training Act (CETA))

CONFLICT OF INTEREST STATUTES
Officers and employees. (*See* OFFICERS AND EMPLOYEES, Contracting with Government, Former employees, Contracts with other than former employing agency)

CONTRACTING OFFICERS
Responsibility
Small business size status determination
Error investigation duty. (*See* CONTRACTS, Small business concerns, Awards, Self-certification, Indication of error, Contracting officer's duty to investigate, etc.)

CONTRACTORS
Government civilian and military personnel
Prohibition
Defense Acquisition Regulation restrictions
Where contracting officer was unaware the awardee was employed by another Government agency on date of award, there was no violation of regulation against knowingly contracting with Government employee. Moreover, agency considered allegation when raised after award and determined that termination of contract for convenience of Government was not warranted since employment was terminated. In addition, General Accounting Office (GAO) finds no evidence in the record of any favoritism towards awardee. In these circumstances, GAO concludes that there is no reason to disturb award 230
Incumbent
Competitive advantage
Unfairness possibility
An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the incumbent contractor, one of which an audit has called into question and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage 65

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Responsibility
Administrative determination
Security clearance
Absence at time of contract award
General Accounting Office will not disturb contracting agency's determination that a firm is nonresponsible where that determination is reasonably based on fact that firm did not have security clearances necessary to perform contract and could not obtain such security clearances in time to perform in an efficient and uninterrupted manner 164
Determination
Review by GAO
Affirmative finding accepted
Complaint that agency improperly found offeror to be responsible without first conducting preaward survey is not for consideration since preaward survey is not legal prerequisite to affirmative determination of responsibility and such determinations are not reviewed by GAO except in situations not applicable to this case 474
Nonresponsibility finding
Contracting officer's nonresponsibility determination based on data supplied by the contracting office, which showed protester delinquent on 70 percent of contract line items, and by the Defense Contract Administration Services Management Area (DCASMA), which showed protester delinquent on 26 percent of contracts due, was reasonable notwithstanding fact that some of the delinquencies may arguably have been agency's fault 213
Bad faith alleged
Fact that protester may have been found responsible by other contracting officers during same period in which protester was found nonresponsible under the protested procurement does not show that contracting officer acted in bad faith in making nonresponsibility determination because such determinations are judgmental and two contracting officers may reach opposite conclusions on the same facts 213
Small business concerns. (*See* CONTRACTS, Small business concerns, Awards, Responsibility determination)
Subcontractors. (*See* CONTRACTS, Subcontractors)

CONTRACTS
Administration
Administrative responsibility
Modification of contract
Within scope of contract requirement
While contract modifications generally are the responsibility of the procuring agency in administering the contract, General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was completed 22
Advertised procurements. (*See* BIDS)

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Complaints
Timeliness
"Reasonable time" standard
Complaint against action of grantee filed with General Accounting Office 16 working days after an adverse agency decision will be considered since complaint was filed within a "reasonable" time 138
Indian low-income housing
Preference to Indian firms
Bid nonresponsive
Nonresponsibility basis
Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise 138
Architect, engineering, etc. services
Procurement practices
Brooks Bill applicability
Procurement not restricted to A-E firms
Administrative determination
General Accounting Office will not question a contracting agency's determination to secure services through competitive bidding procedures rather than through the procedures prescribed in the Brooks Act for the selection of architectural or engineering firms unless the protester demonstrates that the agency clearly intended to circumvent the Act 297
Awards
Abeyance
Resolution of protest
There is no requirement that an agency make an award while a protest is pending before General Accounting Office even though delay in awarding the contract results in an urgent situation requiring that the solicitation be canceled and a portion of the requirement resolicited 637
Small business concerns. (*See* **CONTRACTS, Small business concerns, Awards)**
Withholding pending protest. (*See* **CONTRACTS, Awards, Abeyance)**
Bonds. (*See* **BONDS)**
Brooks Bill applicability. (*See* **CONTRACTS, Architect, engineering, etc. services)**
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Canadian Commercial Corporation. (*See* **FOREIGN GOVERNMENTS, Contracts with United States, Canadian Commercial Corporation)**
Claims brought before award
Claims Court jurisdiction
Federal Courts Improvement Act
An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the in-

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cumbent contractor, one of which an audit has called into question, and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage..... 65

Contract Disputes Act of 1978

Inapplicability

Matters covered by other statutes

Transportation Act

Claims' settlement

Claims for transportation services furnished under the Transportation Act of 1940 are not subject to the disputes resolution procedure of the Contract Disputes Act of 1978 (CDA) since legislative history of CDA indicates no Congressional intent to extend coverage to matters covered by other statutes..... 203

Subcontractor claims

Under the Contract Disputes Act of 1978, contracting officer does not have authority to settle claims of subcontractors who were not parties to prime contract, even when such firms agree to accept *pro rata* settlement from remaining contract funds. Rather, such funds should not be paid until a trustee in bankruptcy and/or court of competent jurisdiction settles accounts among all potential claimants and prime contractor..... 633

Contracting with Government employees. (*See* **OFFICERS AND EMPLOYEES, Contracting with Government**)

Damages

Liquidated

Actual damages *v.* penalty

Price deductions

Reasonableness

Performance Requirements Summaries in invitations for bids (IFBs) for services contracts which permit the Government to deduct from the contractor's payments an amount representing the value of several service tasks where a random inspection reveals a defect in only one task imposes an unreasonable penalty, unless the agency shows the deductions are reasonable in light of the particular procurement's circumstances..... 219

Price reduction *v.* reperformance

Performance Requirements Summaries in IFBs for services contracts which permit the Government to deduct amounts from the contractor's payments for unsatisfactory services do not conflict with any reperformance rights of the contractor. Although the standard "Inspection of Services" clause permits the Government to require reperformance at no cost to the Government, the protester had failed to show that defective services may be reperformed without the Government receiving reduced value..... 219

Reduction of amount

Reasonableness

Agency did not act unreasonably in substantially reducing the amount of liquidated damages that could be imposed where the agency could conclude that the original provision was unnecessary

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Damages—Continued

Liquidated—Continued

Reduction of amount—Continued

Reasonableness—Continued

and, because it could have resulted in a potential risk exposure of 3.5 times the contract price, may have been unenforceable 645

Default

Excess costs

Collection

Disposition

Funding replacement contract

Excess costs of reprocurement recovered from a breaching contractor by the Bureau of Prisons may be used to fund a replacement contract. It is illogical to hold a contractor legally responsible for excess reprocurement costs and then not permit the recovery of those costs to be used for the purpose for which they were recovered. As long as the Bureau receives only the goods and services for which it bargained under the original contract, there is no illegal augmentation of the Bureau's appropriation. Therefore these funds need not be deposited into the Treasury as miscellaneous receipts. Comptroller General decisions to the contrary are modified..... 678

Reprocurement

Defaulted contractor

Not entitled to award

Full price already paid under defaulted contract

Where a defaulted contractor has been paid the full contract price under the defaulted contract, it is not entitled to award of the repurchase contract because it is not permitted to be paid more than the original contract price. Award of the repurchase contract would be tantamount to modification of the original contract without consideration flowing to the Government 469

Federal Supply Schedule

Awards

Propriety

A determination to set aside for small businesses Federal Supply Services (FSS) multiple award contracts for a category of broadly described instruments, solely on the basis that an adequate number of small businesses will submit offers, is improper where the evidence available to the contracting officer at the time the determination is made suggests that only one small business firm can supply a portion of the models and that firm has received the large majority in dollar terms of FSS sales of those particular instruments under a previous FSS set-aside 271

Multiple suppliers

Agency issuance of a request for quotations

Evaluation propriety

GAO finds no legal requirement that procuring agency, after the date an order was ready to be placed under a request for quotations for Federal Supply Schedule (FSS) items, consider fact that low quoter rejected for offering nonschedule items had modified its FSS contract to include rejected items on schedule..... 515

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Payment basis. (*See* **PAYMENTS, Quantum meruit/valebant basis, Absence, etc. of contract, Government acceptance of goods/services)**

In-house performance *v.* contracting out

Cost comparison

Cancellation of solicitation

Specification changes

Anticipated prior to award

Agency may not avoid canceling solicitation where it is aware before award of need for specification changes by use of Changes and Government-Furnished Property clauses which provide for an equitable adjustment for property not delivered by the Government 129

Minimum needs overstated

Cancellation of invitation after bid opening is proper where Government determines, albeit after allegedly inappropriate consideration of OMB Circular A-76 appeal, that solicitation's statement of work overstates actual minimum needs and that Government is no longer able to furnish a significant amount of the Government Furnished Equipment identified in the solicitation 129

Labor stipulations

Davis-Bacon Act

Minimum wage determinations

Union agreement effect

Failure to acknowledge modifying amendment

When union contract would require offeror to pay wages in excess of rates determined under Davis-Bacon Act, and acceptance of bid which failed to acknowledge amendment containing wage determination clearly has no prejudicial effect on competition, offeror may be permitted to cure defect by agreeing to amendment after bid opening 111

Service Contract Act of 1965

Minimum wage, etc. determinations

Prospective wage rate increases

Ceiling provision

GAO has no objection to ceiling provision in escalation clause providing for prices to be adjusted at the beginning of each option period to reflect changes in the Service Contract Act determinations since use of such a provision appears to be a reasonable exercise of contracting officer's authority 542

Liquidated damages. (*See* **CONTRACTS, Damages, Liquidated)**

Modification

Beyond scope of contract

Subject to GAO review

While contract modifications generally are the responsibility of the procuring agency in administering the contract, General Accounting Office will consider a protest that a modification went beyond the contractor's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was competed 22

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Modification—Continued

Scope of contract requirement

Obligation of parties unchanged

Advanced technology approaches

Price unchanged

An agency's acceptance of a firm's post-award offer to change the way it will perform to meet its obligation—furnish a system that would meet various performance specifications—is not outside the contract's scope, even if that change reflects a more advanced or sophisticated approach, where there is no change in the nature of the obligation of either party to the contract 22

Negotiation

Awards

Price determinative factor

Where request for proposals lists the relative weights of the major evaluation criteria, but not the precise weights, there is no requirement that award be made to the offeror whose proposal receives the highest numerical ranking, or that selection officials adhere to the precise weights recommended to them by their advisers. Where selection officials, after evaluating proposals on a basis clearly consistent with the solicitation's scheme, reasonably regard proposals as essentially equal technically, cost or price may be the determinative selection factor, absent justification for an award to a more costly offeror.. 577

Best and final offer. (*See* **CONTRACTS, Negotiation, Offers or proposals, Best and final)**

Competition

Restrictions

Undue restriction established

Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more is within competitive range is improper, since there is no legal basis for such a preference 353

Estimates of Government

Not mandatory

Indefinite, future needs

Life-cycle costing

Where agency specifies additional feature of a system to assure their availability in the future and requires offerors to state prices for those additional features, but agency has no known requirement for those features at the time of procurement, the solicitation need not contain estimates of the usage of those features and they need not be included in the overall price evaluation 124

Evaluation factors. (*See* **CONTRACTS, Negotiation, Offers or proposals, Evaluation)**

Offers or proposals

Best and final

Additional rounds

Auction technique not indicated

Agency's requests for three best and final offers did not automatically establish an auction situation since the multiple best and final

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offers were required by the receipt of contingent offers and the agency's determination that several solicitation requirements, which were inhibiting the competition, were not essential to its minimum needs... 645
Technical changes, etc. not precluded
Request for best and final offers stating that no technical revisions are desired cannot reasonably be interpreted as precluding technical revisions that might make a proposal more competitive. Absent express contrary instructions, offerors should know that changes to their technical proposals are permitted in best and final offers..... 577
Evaluation
Competitive range exclusion
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GAO will not question any agency's technical evaluation or determination whether a proposal is in the competitive range unless shown to lack a reasonable basis or to violate procurement statutes and regulations. The protester's mere disagreement with the agency's judgment does not meet its burden of showing the agency's technical evaluation and competitive range determination were unreasonable..... 577
Cost realism analysis
Adequacy
Contracting agency's analysis of proposals for cost realism involves the exercise of informed judgment, and GAO therefore will not disturb a cost realism determination unless it is shown to lack a reasonable basis. Where the contracting agency independently reviewed the cost realism of offers against a Defense Contract Audit Agency's report based in part on the actual costs of prior performance, the analysis is not legally objectionable where no specific errors are alleged..... 577
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Agency correctly found that the personal statements of evaluators concerning a firm should not be considered in evaluating that firm's experience..... 506
Technical evaluation panel. (*See* CONTRACTS, Negotiation, Technical evaluation panel)
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General Accounting Office will not disturb an agency's technical evaluation unless that evaluation is arbitrary, unreasonable, or in violation of law. In evaluating a firm's experience under an evalua-

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tion criteria, an agency may consider the experience of the firm's personnel and the firm's experience prior to its incorporation 506
Factors not in solicitation
Oral disclosure during negotiations
When offeror is orally informed of an agency's requirement during negotiation, notwithstanding its absence in solicitation, offeror is on notice of the requirement and General Accounting Office will deny protest based on failure to state it in the solicitation 50
Improper
Based on significant misstatements in proposal
Allegation that a competitor's proposal contains false representations in violation of 18 U.S.C. 1001, a criminal statute, raises a matter outside GAO's bid protest function. Nevertheless, if a protester establishes that an offeror made misrepresentations in its offer that materially affected the evaluation, corrective action would be appropriate 577
Life-cycle costing
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Where agency specifies additional features of a system to assure their availability in the future and requires offerors to state prices for those additional features, but agency has no known requirement for those features at the time of procurement, the solicitation need not contain estimate of the usage of those features and they need not be included in the overall price evaluation 124
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Since agency was not required to conduct technical evaluation by comparing the proposals it received, offeror's claim that it had greater experience than two other offerors and, therefore, should have received a higher evaluation score is without merit 506
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General Accounting Office will not disturb an agency's technical evaluation unless that evaluation is arbitrary, unreasonable, or in violation of law. In evaluating a firm's experience under an evaluation criteria, an agency may consider the experience of the firm's personnel and the firm's experience prior to its incorporation 506
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Where request for proposals lists the relative weights of the major evaluation criteria, but not the precise weights, there is no requirement that award be made to the offeror whose proposal receives the highest numerial ranking, or that selection officials adhere to the precise weights recommended to them by their advisers. Where selection officials, after evaluating proposals on a basis clearly consistent with the solicitation's scheme, reasonably regard proposals as essentially equal technically, cost or price may be the determinative selection factor, absent justification for an award to a more costly offeror.. 577

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Propriety
Agency did not act unreasonably in substantially reducing the amount of liquidated damages that could be imposed where the agency could conclude that the original provision was unnecessary and, because it could have resulted in a potential risk exposure of 3.5 times the contract price, may have been unenforceable 645
Cancellation
Reasonable basis
Substantial change in specifications
A contracting officer in negotiated procurement need only establish a reasonable basis for cancellation of a solicitation after receipt of proposals; protest that such cancellation was improper is denied since record indicates increase in scope of work of about 46 percent was required 100
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Protest that agency's failure to resolicit requirement after cancellation of initial solicitation is denied since procurement was conducted under Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, and foreign government on whose behalf procurement was conducted requested award be made to a specific source 100
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Agency's evaluation of technical proposals for the offeror's "Approach/Understanding of Tasks" was reasonable even though the subfactor was not expressly listed in the solicitation. While an agency must identify every major evaluation factor, it need not specify the various aspects of the major criteria, provided the aspects are reasonably related to, or are encompassed by, the stated criteria, which the record clearly shows is the case here 577
Restrictive of competition
Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more is within competitive range is improper, since there is no legal basis for such a preference 353
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Restrictive
Agency determination to use less restrictive specifications
Protest urging that performance type specifications be revised to require certain elements of protester's equipment configuration is in effect an allegation that a more restrictive specification should be

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Procuring agency generally must give offerors sufficient details in request for proposals to enable them to compete intelligently and on relatively equal basis. Where the solicitation sets out estimates as to the extent of the number of services required for evaluation purposes, establishes a minimum ordering requirement, and identifies the types and levels of services required, the solicitation is sufficient for the preparation of proposals 124
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Assignee's right to payment
First *v.* second assignee
First assignee's (computer leasing company/financing institution) claim for sums paid to second assignee (also computer leasing company/financing institution) under modification of the same contract is denied because (1) the first assignee has only a qualified interest in the assigned payment, commensurate with the amount of equipment which it financed, and (2) it appears that the first assignee has received all payments it is entitled to for the equipment which it financed. Therefore, first assignee has no basis for its claim 368

CONTRACTS—Continued Page
Payments—Continued
Assignment—Continued
Set-off
"No set-off" clause
Under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, a lender is not protected against set-off by the presence of a no-set-off clause in the assigned contract unless the assignment was made to secure the assignee's loan to the assignor and only if the proceeds of the loan were used or were available for use by the assignor in performing the contract that was assigned. To the extent that our holdings in 49 Comp. Gen. 44 (1967), 36 Comp. Gen. 19 (1956), and other cases cited herein are not consistent with this decision they will no longer be followed. 60 Comp. Gen. 510 (1981) is clarified 683
Conflicting claims
Assignee *v.* I.R.S
When a contract containing a no-set-off clause is validly assigned under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, to an eligible assignee who substantially complies with the statutory filing and notice requirements, the Internal Revenue Service cannot set off the contractor's tax debt against the contract proceeds due to the assignee, even if the tax debt was fully mature prior to the date on which the contracting agency had received notice of the assignment. B–158451, Mar. 3, 1966, and B–195460, Oct. 18, 1979, are modified accordingly. 60 Comp. Gen. 510 (1981) is clarified 683
Progress
Request
What constitutes
Canadian bids
Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases modified in part 113
Quantum meruit/valebant basis. (*See* **PAYMENTS, Quantum meruit/valebant basis)**
Set-off. (*See* **SET-OFF, Contract payments)**
Surety of defaulted contractor
"Unexpended contract balance"
Calculation of balance
Mistaken overpayment to contractor included
Under surety law surety has election to pay Government's excess cost of completing contract or undertaking to finish the job himself. Under latter election, surety, upon successful completion, is entitled to his costs, up to the unexpended balance of the contract. In considering amount of unexpended balance available to pay performance bond surety his costs for completion of a defaulted National Institutes of Health Contract, Government must consider contract balance to include amount of the Government's previous mistaken overpayment to the contractor 498

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Performance

Defects

Liability

Performance Requirements Summaries in invitations for bids (IFBs) for services contracts which permit the Government to deduct from the contractor's payments an amount representing the value of several service tasks where a random inspection reveals a defect in only one task imposes an unreasonable penalty, unless the agency shows the deductions are reasonable in light of the particular procurement's circumstances 219

Reperformance entitlement

Reduced value determination

Performance Requirements Summaries in IFBs for services contracts which permit the Government to deduct amounts from the contractor's payments for unsatisfactory services do not conflict with any reperformance rights of the contractor. Although the standard "Inspection of Services" clause permits the Government to require reperformance at no cost to the Government, the protester had failed to show that defective services may be reperformed without the Government receiving reduced value 219

Privity

Subcontractors

Default of prime contractor

Government liability

Subcontractors and suppliers, claiming amounts due for labor and materials furnished to defaulted prime contractor, may not bring a claim directly against the Government when, under any common law theory, they lack privity of contract with the Government 633

Protests

Academic questions. (*See* **CONTRACTS, Protests, Moot, academic, etc. questions**)

Allegations

Unsubstantiated

Protest that Buy American Act evaluation should not have been conducted because sole domestic bid, which was not low, was, allegedly, bogus is rejected. Bogus charge relates to allegation concerning domestic bidder's alleged nonresponsibility. But Buy American regulatory scheme does not require responsibility determination of domestic bidder in this situation. Moreover, General Accounting Office does not consider that a responsibility determination need be made absent collusion or other extraordinary circumstances not present in this procurement. Finally, domestic bid contained no indication that it was other than domestic 345

Authority to consider

Disputes between private parties. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Disputes, Between private parties**)

Federal Reserve System

Member bank contracts

General Accounting Office (GAO) will not decide protest against contract award by Federal Reserve Bank, despite GAO audit authority, because GAO account settlement authority (the basis of GAO bid

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Authority to consider—Continued
Federal Reserve System—Continued
Member bank contracts—Continued
protest jurisdiction) does not extend to Federal Reserve System banks 40
Service Contract Act matters. (*See* BIDS, Invitation for bids, Ambiguous, Service Contract Act provisions)
United States-Saudi Arabia Joint Commission on Economic Cooperation procurements
The GAO is not authorized to settle and adjust the dollar account used to hold Saudi Arabian monies covering Joint Commission project costs, and thus, will not entertain bid protests of Joint Commission procurements where, as in all Joint Commission projects except one, no United States funds are involved at any stage of the procurement. The holding in *Mandex, Inc.*, B-204415, Oct. 13, 1981 is affirmed. Foreign Military Sales procurements are distinguished 410
Award withheld pending GAO decision
Urgency of procurement
There is no requirement that an agency make an award while a protest is pending before General Accounting Office even though delay in awarding the contract results in an urgent situation requiring that the solicitation be canceled and a portion of the requirement resolicited 637
Contracting officer's affirmative responsibility determination. (*See* CONTRACTORS, Responsibility, Determination)
General Accounting Office authority
Disputes between private parties. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Disputes, Between private parties)
General Accounting Office function
Independent investigation and conclusions
Speculative allegations
It is not part of General Accounting Office's bid protest function to conduct investigations to determine whether protester's speculative allegations are valid 75
General Accounting Office procedures
Timeliness of protest
Date basis of protest made known to protester
Two grounds of protest against application of Buy American Act evaluation factor are timely when filed within 10 working days of when the protester learns of basis of protest. Final ground of protest is untimely filed but will be considered under significant issue exception to Bid Protest Procedures 345
Significant issue exception
For application
General Accounting Office will consider protest challenging requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions since significant issue is involved. B-204037, Dec. 14, 1981, is amplified 428

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Protests—Continued
General Accounting Office procedures—Continued
Timeliness of protest—Continued
Solicitation improprieties
Apparent prior to bid opening/closing date for proposals
Protest filed well after bid opening, objecting to the agency's failure to postpone bid opening to allow protester to assess the impact of an amendment to the solicitation, is untimely 542
Not apparent prior to closing date for receipt of quotations
Amended protest which was filed the day after the protester modified its Federal Supply Schedule contract to include partitions required by the agency under its request for quotations is timely because basis for protest—that agency was required to place an order under the modified contract—did not arise until the modification 515
Interested party requirement
Small business set-asides
Protester rejected as other than small business under 100-percent small business set-aside procurement contending it was improperly rejected is interested party under General Accounting Office Bid Protest Procedures because if protest is sustained the protester would be eligible for award 458
Moot, academic, etc. questions
Award made to protester
Where protest is against a contract award which has been terminated and the contract has been reawarded to protester, it is academic and will not be considered on the merits. Also, protest against initial proposal evaluation is academic where agency reevaluated the proposal and awarded protester the maximum possible score 506
Proprietary data
Use by competitor
No disclosure by contracting agency. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Disputes, Between private parties)
Subcontractor protests
Protest against award of subcontract on behalf of Government by Department of Energy prime contractor is appropriate for General Accounting Office review under standards of *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Nonunion protester, whose bid prime contractor did not open, is interested party, in particular circumstances, for purposes of protesting requirement for subcontractors to have union agreement notwithstanding that protester withdrew its bid. B-204037, Dec. 14, 1981, is amplified 428
Timeliness
General Accounting Office procedures. (*See* CONTRACTS, Protests, General Accounting Office procedures, Timeliness of protest)
Quantum meruit/valebant
Payment basis. (*See* PAYMENTS, Quantum meruit/valebant basis)
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Research and development

Small Business Innovation Development Act Appropriation availability. (*See* APPROPRIATIONS, Availability, Contracts, Research and development, Small Business Innovation Development Act)

Responsibility of contractors

Determination. (*See* CONTRACTORS, Responsibility, Determination)

Sales. (*See* SALES)

Service Contract Act. (*See* CONTRACTS, Labor stipulations, Service Contract Act of 1965)

Small business concerns

Awards

Responsibility determination

Government Printing Office contracts

The Government Printing Office is a legislative agency which is excluded from coverage of the Small Business Act. Therefore, its determination that a small business concern is nonresponsible need not be referred to the Small Business Administration for review under certificate of competency procedures..... 164

Nonresponsibility determination

Certificate of Competency denial on recent procurement—resubmission to SBA not required

Under limited circumstances, a recent denial by the Small Business Administration (SBA) for a certificate of competency may be used by a contracting officer as SBA confirmation of another finding of nonresponsibility..... 469

Nonresponsibility finding

Referral to SBA for COC mandatory without exception

Contracting officer's determination of nonresponsibility, based on finding that small business concern otherwise in line for award does not have acceptable quality assurance system to perform required work, must be referred to Small Business Administration (SBA), albeit on an expedited basis, for consideration under certificate of competency (COC) program, since applicable law and regulations no longer allow exception to this requirement based on urgency. However, General Accounting Office recommends that Executive branch consider developing expedited COC procedure to permit prompt consideration of COC referrals by SBA when critically urgent procurements are involved..... 134

Small purchases. (*See* PURCHASES, Small, Small business concerns, Certificate of Competency procedures under SBA, Applicability)

Review by GAO

Procurement under 8(a) program

Contractor eligibility

The determination whether to set aside a procurement under section 8(a) of the Small Business Act (15 U.S.C. 637(a)) and issues concerning contractor eligibility for subcontract award are matters for the contracting agency and Small Business Administration and are not subject to review by General Accounting Office absent a showing of fraud or bad faith on the part of Government officials 205

CONTRACTS—Continued Page
Small business concerns—Continued
Awards—Continued
Review by GAO—Continued
Procurement under 8(a) program—Continued
Fraud or bad faith alleged
In protest involving 8(a) procurement, fraud or bad faith is not shown by: (1) fact that contracting agency originally considered sole-source award to large business; (2) fact that contracting agency initially issued total small business set-aside, then canceled it before bid opening in order to make 8(a) award to Small Business Administration (SBA); (3) allegation that SBA violated its own Standard Operating Procedures, since they may be waived 205
Self-certification
Indication of error
Contracting officer's duty to investigate, etc.
While contracting officer and Small Business Administration considered timely size protest contained insufficient detail, contracting officer should have pursued matter on his own initiative under Defense Acquisition Regulation 1-703(b)(2) where data submitted by proposed awardee in bid indicated $5 million size standard may be exceeded 300
Set-asides
Administrative determination
Reasonable expectation of competition
A determination to set aside for small businesses Federal Supply Service (FSS) multiple award contracts for a category of broadly described instruments, solely on the basis that an adequate number of small businesses will submit offers, is improper where the evidence available to the contracting officer at the time the determination is made suggests that only one small business firm can supply a portion of the models and that firm has received the large majority in dollar terms of FSS sales of those particular instruments under a previous FSS set-aside 271
Qualifications of small businesses
Business entity organized for profit requirement
To qualify as a small business concern a concern must be a business entity organized for profit. The contracting officer acted reasonably in rejecting bid in which bidder represents that it is a nonprofit organization, thus indicating that bidder is other than a small business concern and ineligible for award under a small business set-aside 458
Research and development
Appropriation availability. (*See* APPROPRIATIONS, Availability, Contracts, Research and development, Small Business Innovation Development Act)
Withdrawal
Best interest of Government
Contracting officer reasonably determined that the public interest would best be served by canceling small business set-aside before bid opening in order to set aside the procurement for award to the Small Business Administration (SBA) under its 8(a) program for small, disadvantaged businesses (15 U.S.C. 637(a) (Supp. III, 1979)) where deter-

CONTRACTS—Continued Page
Small business concerns—Continued
Awards—Continued
Set-asides—Continued
Withdrawal—Continued
Best interest of Government—Continued
mination was: (1) an attempt to effectuate Government's socioeconomic interests; (2) necessary since contracting agency was unaware at time it issued small business set-aside that a viable 8(a) firm was capable of performing the work; and (3) concurred in by SBA 205
Size status
Time to question
The contracting officer has the right to question a bidder's status as a small business at any time during the award process 637
Small purchases. (*See* PURCHASES, Small)
Specifications
Advertised procurements. (*See* BIDS, Invitation for bids, Specifications)
Changes, revisions, etc.
After award. (*See* CONTRACTS, Modification)
Negotiated procurements. (*See* CONTRACTS, Negotiation, Requests for proposals, Specifications)
Subcontractors
Disputes with prime contractor
Government's obligation
Under the Contract Disputes Act of 1978, contracting officer does not have authority to settle claims of subcontractors who were not parties to prime contract, even when such firms agree to accept *pro rata* settlement from remaining contract funds. Rather, such funds should not be paid until a trustee in bankruptcy and/or court of competent jurisdiction settles accounts among all potential claimants and prime contractor 633
Privity. (*See* CONTRACTS, Privity, Subcontractors)
Subcontracts
Privity between subcontractor and United States. (*See* CONTRACTS, Privity, Subcontractors)
Termination of prime contract
Subcontractors and suppliers, claiming amounts due for labor and materials furnished to defaulted prime contractor, may not bring a claim directly against the Government when, under any common law theory, they lack privity of contract with the Government 633
Termination
Convenience of Government
Erroneous evaluation, etc.
Agency properly terminated contract with protester where reevaluation of proposals showed that under the stated criteria, another firm received the highest score 506
Two-step procurement
Step two
Nonresponsive bid
Deviation apparent in step one
A contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror. Therefore, the accept-

CONTRACTS—Continued Page
Two-step procurement—Continued
Step two—Continued
Nonresponsive bid—Continued
Deviation apparent in step one—Continued
ance of a firm's technical proposal under step one of a two-step proposal does not bind the Government to accept that firm's step two bid if the bid is nonresponsive, even though the deviation from the terms of the solicitation was contained in the step-one technical proposal 31
Terms and conditions
Acceptance time limitation
Shorter period offered
Compliance with a mandatory minimum bid acceptance period established in an invitation for bids is a material requirement because a bidder offering a shorter acceptance period has an unfair advantage since it is not exposed to marketplace risks and fluctuations for as long as its competitors are. Therefore, a bid which takes exception to the requirement by offering a shorter acceptance period is nonresponsive and cannot be corrected 31
Defective invitation
Cross-referencing necessity
A Standard Form 33 solicitation provision which provides that a 60-day bid acceptance period will apply unless the bidder specifies a different number of days should have been cross-referenced with another solicitation provision which provides that bids with acceptance periods of fewer than 45 days would be considered nonresponsive. The failure to cross-refer was not in this case grossly misleading and, therefore, the cancellation of the solicitation is not required 31

CORPORATIONS
Legal Services Corporation
Advocacy or opposition of ballot measures
During a January 1981 training session at the LSC Denver Region, Alan Rader, a staff attorney with the Western Center on Law and Poverty in Los Angeles, an LSC grantee, gave a presentation on how he had organized a campaign with LSC funds to defeat a 1980 California tax reduction ballot measure entitled "Proposition 9." He hired campaign coordinators and organized broad-based coalitions with community groups and agencies. This activity constitutes a violation of 42 U.S.C. 2996e(d)(4) which prohibits the Corporation and its grantees from using corporate funds to advocate or oppose ballot measures 654
Coalition and network building
The LSC held a training session in its Denver Region in January 1981. Representatives of grantees in the 5-state region attended. Corporate officials and grantee staff attorneys presented lectures and workshops on how grantees could build coalitions with community groups and agencies to form a grass roots organization to lobby Congress for legal services and other social benefit programs. Grantee representatives described coalition building projects that were underway. This activity constitutes a violation of 42 U.S.C. 2996f(b)(7)

CORPORATIONS—Continued Page
Legal Services Corporation—Continued
Coalition and network building—Continued
which prohibits grantees from using corporate funds to build organizations such as coalitions and networks 654
Conducting training programs
Advocacy of public policies
During January 1981, the Denver Regional Office of the Legal Services Corporation (LSC) held a training session for grantee personnel of the region. The training session speakers included Corporation headquarters officials and officials from grantees, who presented material on the LSC Survival Plan. These officials advocated the public policy of resisting the threatened Reagan Administration cuts in the legal services and other social benefits programs. These same speakers encouraged those in attendance to engage in political activities of building coalitions in order to mount a grass roots campaign to lobby Congress to vote against measures to curtail these programs. This activity constituted a violation of 42 U.S.C. 2996f(b)(6) which prohibits the use of corporate funds by grantees to conduct training programs that advocate public policies or encourage political activities 654
Enforcement responsibilities
Compliance of recipients with LSC Act
The LSC and certain grantees conducted a training session in the LSC Denver Region in January 1981 during which grantee officials violated certain restrictions on training and coalition building activities contained in 42 U.S.C. 2996f(b) (6) and (7). The Corporation failed to carry out its enforcement responsibilities under 42 U.S.C. 2996e(b)(1) to insure the compliance of recipients and their employees with the provisions of the Legal Services Corporation Act of 1974, and assumed a contrary role of encouraging grantees to violate the aforementioned provisions 654

COURTS
Judges
Compensation
Increases
Comparability pay adjustment
Precluded under Pub. L. 97-92
Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in Oct. 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since sec. 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on Oct. 1, 1982, in the absence of specific congressional authorization 54
Specific Congressional authorization requirement
Question presented is entitlement of Federal judges to 4 percent comparability increase under sec. 129 of Pub. L. 97-377, Dec. 21, 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of sec. 129(b) of Pub. L. 97-377, combined with spe-

COURTS—Continued Page
Judges—Continued
Compensation—Continued
Increases—Continued
Comparability pay adjustment—Continued
Specific Congressional authorization requirement—Continued
cific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges.... 358
Judgments, decrees, etc.
Interest
Delayed payment of judgment
Not due to unsuccessful Government appeal
Court of Claims judgment
Interest is allowable on Court of Claims judgment under 28 U.S.C. 2516(b) only in cases of unsuccessful appeal by the Government. Delay resulting from consideration of whether to seek further review, or from filing of post-judgment motions, does not create entitlement to interest. Therefore, Plaintiffs are not entitled to interest on Court of Claims judgment where Department of Justice did not certify judgment to General Accounting Office for payment until after Court had denied Government's motion to vacate. 59 Comp. Gen. 259 and 58 *id.* 67 are explained..... 4
Payment
Permanent indefinite appropriation availability
Compromise settlement
Payment otherwise provided for
Secretary of Housing and Urban Development (HUD) provided building mortgage insurance on two projects under authority of sec. 236 of the National Housing Act, 12 U.S.C. 1715z-1. In one case, the Secretary agreed to make payments to plaintiff construction contractor in settlement of lawsuit after court had ruled that the contractor had cause of action against the Secretary on the theory of *quantum meruit.* In the second case, similar payment was directed by court judgment. The permanent indefinite appropriation established by 31 U.S.C. 724a is not available in either case. The permanent appropriation may be used to pay a judgment or compromise settlement only if no other funds are available for that purpose. The Special Risk Insurance Fund, a revolving fund created by 12 U.S.C. 1715z-3(b), is available for the payments to contractors for completion of projects for which HUD has provided mortgage insurance under sec. 236..... 12
Effect of Equal Access to Justice Act
Section 207 of Equal Access to Justice Act (EAJA) (5 U.S.C. 504 note) prohibits use of permanent judgment appropriation established by 31 U.S.C. 1304 as alternative source of funds for payment of awards newly authorized by EAJA unless and until Congress makes a specific appropriation for that purpose 692
Payment otherwise provided for
U.S. Marshals Service seizure costs
Permanent judgment appropriation, 31 U.S.C. 1304, is not available to pay storage charges assessed against the United States, where the Marshals Service has the legal responsibility to pay such charges

COURTS—Continued Page
Judgments, decrees, etc.—Continued
Payment—Continued
Permanent indefinite appropriation availability—Continued
Payment otherwise provided for—Continued
U.S. Marshals Service seizure costs—Continued
once it seizes the property pursuant to the execution of a warrant *in rem* 177
Res judicata
Subsequent claims
An employee seeks a Comptroller General decision on his entitlement to salary retention. The General Accounting Office (GAO) adheres to the doctrine of *res judicata* to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the GAO. 47 Comp. Gen. 573. Since in *William C. Ragland* v. *Internal Revenue Service,* Appeal No. 55-81 (C.A.F.C. November 1, 1982), it was previously decided that the employee was not entitled to saved pay benefits, the GAO will not consider his claim for salary retention 399
Jurors
Fees
Military personnel in State courts
Pay deduction
A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours 39
Government employees
Firefighters
Overtime compensation
Fair Labor Standards Act applicability. (*See* COMPENSATION, Overtime, Firefighting, Fair Labor Standards Act, Court leave)
Magistrates
Authority
Withdrawal from court registry funds
Upon consent of all the parties, a magistrate may be specially designated to make final determinations of the district court in all civil matters. 28 U.S.C. 636(c), as amended in 1979. Therefore, in those cases, a magistrate may also be legally authorized to order withdrawal of money from the court registry 404
Witnesses
Leave of absence from regular duty. (*See* LEAVES OF ABSENCE, Court)

CRIMINAL LAW VIOLATIONS
Not for GAO consideration
Allegation that a competitor's proposal contains false representations in violation of 18 U.S.C. 1001, a criminal statute, raises a matter outside GAO's bid protest function. Nevertheless, if a protester establishes that an offeror made misrepresentations in its offer

CRIMINAL LAW VIOLATIONS—Continued Page
Not for GAO consideration—Continued
that materially affected the evaluation, corrective action would be appropriate 577

CUSTOMS
Services to the public
Reimbursement. (*See* **FEES, Services to the public**)

DAVIS-BACON ACT (*See* **CONTRACTS, Labor stipulations, Davis-Bacon Act**)

DEBT COLLECTIONS
Accountable officers
Relief. (*See* **ACCOUNTABLE OFFICERS, Relief**)
By Government employees requirement
Collection of fees owed the United States is an inherent governmental function which may be performed only by Federal employees. 339
Collection by non-employees
System for protection of Government
Feasibility questionable
General Accounting Office questions the feasibility of developing a system of alternative controls to protect the Government against loss in the event that volunteers collect Government monies 339
Cancellation
The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended 308
Federal Claims Collection Act of 1966. (*See* **FEDERAL CLAIMS COLLECTION ACT OF 1966**)
Military personnel
Retired
Missing, interned, etc. status
While in private employment
Erroneous retired pay payments
A retired member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. Retired pay payments continued to be sent to the member's bank account (apparently a joint account with his wife) until 1981, when Finance Center first learned of missing status. Since it is not known whether the retired member is dead or alive, payments should be recouped for the period after the last date the retired member was known to be alive and credited to his account pending an acceptable determination of his existence or death 211
Social Security payments. (*See* **SOCIAL SECURITY, Benefits, Overpayments, Debt collection**)

DEBT COLLECTIONS—Continued Page

Waiver

Civilian employees

Compensation overpayments

Failure to deduct insurance premiums

Optional life

Employee elected regular and optional life insurance coverage under the Federal Employees' Group Life Insurance Program (FEGLI), but when he transferred in 1969 the new agency stopped deducting his optional insurance premiums due to an administrative error. Since the employee received Leave and Earnings Statements throughout the period in question, which reflected optional premium deductions before his transfer, but not afterward, his failure to examine the statements and to note the error makes him at least partially at fault, thereby precluding waiver under 5 U.S.C. 5584 608

DEFENSE ACQUISITION REGULATION

Advertised procurements

Progress payment clause

Absence

Bid responsiveness

Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases modified in part 113

Arms Export Control Act

Implementation

Competition not required

Sole-source procurement requested

Protest that provisions in Defense Acquisition Regulation requiring contracting officer to honor request of a foreign government to sole-source procurement are unlawful because they violate requirement for competitive procurement in 10 U.S.C. 2304(a) is without merit because that provision is not applicable to foreign military sales procurements if the foreign government requests a sole-source procurement 100

Consistency with law requirement

Absence of congressional objection

In subsequent appropriation acts

Specialty metals' procurements

Agency interpretation of Department of Defense Appropriation Act restriction against the purchase of articles consisting of foreign specialty metals as reflected in DAR 6-302 is to be accorded deference. General Accounting Office will not object to DAR 6-302 provision that statutory restriction is met if the specialty metal is melted in the United States, notwithstanding protester's contention that statute requires that such articles be manufactured entirely in the United States. DAR provision is based on wording in legislative history and has been in existence for 10 years without congressional objection. 49 Comp. Gen. 606 is distinguished 256

DEFENSE ACQUISITION REGULATION—Continued Page
Contracting with Government employees
Restrictions
Where contracting officer was unaware the awardee was employed by another Government agency on date of award, there was no violation of regulation against knowingly contracting with Government employee. Moreover, agency considered allegation when raised after award and determined that termination of contract for convenience of Government was not warranted since employment was terminated. In addition, General Accounting Office (GAO) finds no evidence in the record of any favoritism towards awardee. In these circumstances, GAO concludes that there is no reason to disturb award 230

DEFENSE DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, Defense Department)

DEFENSE OFFICER PERSONNEL MANAGEMENT ACT
Involuntary separation
Military personnel
Pub. L. 96–513 effect. (*See* DISCHARGES AND DISMISSALS, Military personnel, Involuntary separation, Pub. L. 96–513 effect)

DEPARTMENTS AND ESTABLISHMENTS
Adjudicative proceedings
Public intervenors
Appropriation availability. (*See* APPROPRIATIONS, Availability, Intervenors)
Closing authority. (*See* AGENCY)
Lobbying
Anti-lobbying statutes
During January 1981, the Denver Regional Office of the Legal Services Corporation (LSC) held a training session for grantee personnel of the region. The training session speakers included Corporation headquarters officials and officials from grantees, who presented material on the LSC Survival Plan. These officials advocated the public policy of resisting the threatened Reagan Administration cuts in the legal services and other social benefits programs. These same speakers encouraged those in attendance to engage in political activities of building coalitions in order to mount a grass roots campaign to lobby Congress to vote against measures to curtail these programs. This activity constituted a violation of 42 U.S.C. 2996f(b)(6) which prohibits the use of corporate funds by grantees to conduct training programs that advocate public policies or encourage political activities 654
Services between
Appropriation obligation
Section 601 of the Economy Act, as amended, 31 U.S.C. 686 (now 31 U.S.C. 1535), permits one agency or bureau of the Government to furnish materials, supplies or services for another such agency or bureau on a reimbursable basis. However, since the Presidential Inaugural Committee (PIC) is not a Government agency and DOD used its own appropriations without reimbursement from either the PIC or Joint Congressional Committee on Inaugural Ceremonies in par-

DEPARTMENTS AND ESTABLISHMENTS—Continued Page
Services between—Continued
Appropriation obligation—Continued
ticipating in the 1981 Presidential inaugural activities, the authority of the Economy Act was not available 323

DISBURSING OFFICERS
Altered check cashed
Full restitution made
Account in balance
Relief not necessary
When dishonest payee who altered Government check for final pay makes full restitution of all amounts over and above his entitlement which were fraudulently obtained from military disbursing officer, account may be considered in balance. 27 Comp. Gen. 674 is explained and distinguished 614

DISCHARGES AND DISMISSALS
Military personnel
Involuntary separation
Pub. L. 96–513 effect
Travel and transportation allowances
To home of selection
The Joint Travel Regulations, Vol. 1, may be amended to include travel and transportation allowances to a home of selection for a member discharged or released from active duty with separation pay under 10 U.S.C. 1174 (Supp. IV, 1980). A statute must be read in the context of other laws pertaining to the same subject and should be interpreted in light of the aims and designs of the total body of law of which it is a part 174

DISCRIMINATION
Title VII
Complaints
Informal agency settlement. (*See* CIVIL RIGHTS ACT)
Equal Employment Opportunity
Commission authority. (*See* EQUAL EMPLOYMENT OPPORTUNITY)

ECONOMIC DEVELOPMENT ADMINISTRATION. (*See* COMMERCE DEPARTMENT, Economic Development Administration)

ENERGY
Department of Energy
Authority and responsibility
Oil price and allocation regulation
Recovered overcharges. (*See* FUNDS, Recovered overcharges)

EQUAL ACCESS TO JUSTICE ACT
Appropriations
Availability
Intervenors. (*See* APPROPRIATIONS, Availability, Intervenors)
Attorneys' fees. (*See* ATTORNEYS, Fees, Equal Access to Justice Act)

EQUAL ACCESS TO JUSTICE ACT—Continued Page
Awards, judgments, etc.
Payment
Permanent judgment appropriation
Section 207 of Equal Access to Justice Act (EAJA) (5 U.S.C. 504 note) prohibits use of permanent judgment appropriation established by 31 U.S.C. 1304 as alternative source of funds for payment of awards newly authorized by EAJA unless and until Congress makes a specific appropriation for that purpose 692

EQUAL EMPLOYMENT OPPORTUNITY
Commission
Authority
Title VII discrimination complaints
Informal agency settlement
Remedial actions
The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision 239

EQUIPMENT
Telecommunications systems
Procurement
Procuring agency generally must give offerors sufficient details in request for proposals to enable them to compete intelligently and on relatively equal basis. Where the solicitation sets out estimates as to the extent of the number of services required for evaluation purposes, establishes a minimum ordering requirement, and identifies the types and levels of services required, the solicitation is sufficient for the preparation of proposals 124

FAIR LABOR STANDARDS ACT
Applicability
Employees of United States
Fair Labor Standards amendments, Pub. L. 93-259
Firefighters
Overtime compensation. (*See* COMPENSATION, Overtime, Firefighting, Fair Labor Standards Act)
Enforcement provisions
Office of Personnel Management role. (*See* OFFICE OF PERSONNEL MANAGEMENT, Jurisdiction, Fair Labor Standards Act)
Overtime
Compensation. (*See* COMPENSATION, Overtime, Fair Labor Standards Act)
Recordkeeping requirements. (*See* RECORDS, Recordkeeping requirements, Fair Labor Standards Act)

FARMERS HOME ADMINISTRATION. (*See* AGRICULTURE DEPARTMENT, Farmers Home Administration)

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FEDERAL AVIATION ADMINISTRATION
Employees
Premium pay
Entitlement
Section 145 of Pub. L. 97-377, Dec. 21, 1982, which amends 5 U.S.C. 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to Aug. 3, 1981, as were the original provisions of 5 U.S.C. 5546a(a) added by subsec. 151(a) of Pub. L. 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express language nor the legislative history supports the view that the amendment made by sec. 145 is retroactively effective 396

FEDERAL BANKING AGENCY AUDIT ACT
Amendments
Audit authority of GAO. (*See* **GENERAL ACCOUNTING OFFICE, Audits, Authority, Federal Reserve System**)

FEDERAL CLAIMS COLLECTION ACT OF 1966
Compromise, waiver, etc. of claims
Authority
Consideration of debtor's financial condition
Under the Federal Claims Collection Standards, 4 C.F.R. Chapter II, when determining whether to compromise claims, or suspend or terminate collection activity, agencies should exercise sound discretion, and may consider, among other factors, the financial condition of the debtor. The fact that the debtor is receiving Government benefits is merely one more factor to be considered when determining whether compromise, suspension, or termination (or some other action) best serves and protects all of the Government's interests 599
Procedure
Standards
Agency implementation
Administrative offset
Whether collection by administrative offset under the Federal Claims Collection Standards, 4 C.F.R. Chapter II, is "feasible" lies within the agency's exercise of sound discretion, on a case-by-case basis. The term is not synonymous with "possible." Agencies should consider not only whether administrative offset can be accomplished, both practically and legally, but also whether it is best suited to further and protect the Government's interests. In certain circumstances, agencies may give due consideration to the debtor's financial condition, and are not required to use offset in every instance in which there is an available source of funds, for example, where those funds are payments under a benefit program designed to avoid or alleviate financial hardship 599
Applicability
Social Security Act
Social Security Administration is not bound by Federal Claims Collection Standards (FCCS) requiring administrative offset "in every instance in which this is feasible," in light of section 8(e) of the Debt

FEDERAL CLAIMS COLLECTION ACT OF 1966—Continued Page
Procedure—Continued
Standards—Continued
Applicability—Continued
Social Security Act—Continued
Collection Act of 1982, 31 U.S.C. 3701(d). The FCCS, 4 C.F.R. Chapter II, to the extent they implement the 1982 legislation, do not govern the use of administrative offset to collect debts arising under the Social Security Act. However, Social Security Administration may continue to use administrative offset to collect such debts when authorized by other statutes or principles of common law, and should look to FCCS for guidance to the extent it has not issued its own offset regulations 599

FEDERAL COURTS IMPROVEMENT ACT OF 1982
Contract claims brought before award
Claims Court jurisdiction. (*See* CONTRACTS, Claims brought before award, Claims Court jurisdiction, Federal Courts Improvement Act)

FEDERAL PRISON INDUSTRIES, INC. (*See* PRISONS AND PRISONERS)

FEDERAL SUPPLY SCHEDULE CONTRACTS. (*See* CONTRACTS, Federal Supply Schedule)

FEES
Attorneys. (*See* ATTORNEYS, Fees)
Jury. (*See* COURTS, Jurors, Fees)
Services to the public
Charges
Cost recovery
When employees of the Customs Service participate as instructors in programs to train travel agents in Customs requirements and procedures so that the travel agents will, in turn, provide this information to travelers, the Customs Service must charge a fee to recover the full cost of the special benefit conferred. Any receipts may be deposited to the credit of the appropriation of the Customs Service pursuant to 19 U.S.C. 1524 262
User fees
Recovery of cost
By Government employees requirement
Collection of fees owed the United States is an inherent governmental function which may be performed only by Federal employees. 339
General Accounting Office questions the feasibility of developing a system of alternative controls to protect the Government against loss in the event that volunteers collect Government monies 339

FLY AMERICA ACT
Travel by noncertificated air carriers. (*See* TRAVEL EXPENSES, Air travel, Fly America Act, Employees' liability)

FOOD
Meals furnished
Reimbursement. (*See* MEALS, Furnishing, General rule)

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FOREIGN GOVERNMENTS

American citizens

Employment

Military retirees

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Art. I. sec. 9, cl. 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C. 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government 432

Contracts with United States

Canadian Commercial Corporation

Endorsement of Canadian bid/offer

Canadian Commercial Corporation, a corporation of the Government of Canada, is required to submit an unequivocal endorsement of Canadian producer's bid. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases are modified in part 113

Defense articles and services

Arms Export Control Act

Foreign military sales program

Competition requirement inapplicability

Sole-source award requested

Protest that provisions in Defense Acquistion Regulation requireing contracting officer to honor request of a foreign government to sole-source procurement are unlawful because they violate requirement for competitive procurement in 10 U.S.C. 2304(a) is without merit because that provision is not applicable to foreign military sales procurements if the foreign government requests a sole-source procurement 100

Employment of U.S. Government retirees. (*See* **FOREIGN GOVERNMENTS, American citizens, Employment**)

Military assistance

Arms Export Control Act. (*See* **FOREIGN GOVERNMENTS, Defense articles and services, Arms Export Control Act**)

FOREIGN SERVICE

Foreign Service Grievance Board

Decisions

General Accounting Office review. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Foreign Service Grievance Board decisions**)

FOREST SERVICE

Other than timber sales. (*See* **AGRICULTURE DEPARTMENT, Forest Service**)

FUNDS

Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)

FUNDS—Continued Page
Recovered overcharges
Distribution
Department of Energy
In distributing funds under consent orders with alleged violators of petroleum price and allocation regulations, Dept. of Energy must attempt to return funds to those actually injured by overcharges. Where this is not possible, Energy must use mandatory procedure established by 10 C.F.R. 205.280 *et seq.*, which creates mechanisms for injured parties to claim refunds. Distribution of consent order funds by oil companies is not permissible without restitutionary nexus because Energy lacks authority to do indirectly what it cannot do directly. In-kind deposit of oil in Strategic Petroleum Reserve by oil companies is not permissible because it lacks restitutionary nexus and is not otherwise authorized 379
Distribution of consent order funds to states by oil companies or Dept. of Energy is permissible only if states are required to use funds exclusively for energy-related purposes with restitutionary nexus to nature of overcharges, for benefit of class of consumers overcharged, and according to plans approved by Energy. Any funds not able to be distributed by oil companies in appropriate restitutionary manner must revert to Energy for disposition under procedure in 10 C.F.R. 205.280 *et seq.* If no consumers or classes of consumers can be identified by administrative procedure, and no restitutionary nexus for payments to states can be found, only remaining authorized distribution is deposit of funds in miscellaneous receipts account of Treasury. 379

GENERAL ACCOUNTING OFFICE
Adminsitrative Procedure Act
Inapplicability. (*See* ADMINISTRATIVE PROCEDURE ACT, Inapplicability)
Audits
Authority
Fedeal Reserve System
Federal Banking Agency Audit Act
Amendment (1978)
General Accounting Office (GAO) will not decide protest against contract award by Federal Reserve Bank, despite GAO audit authority, because GAO account settlement authority (the basis of GAO bid protest jurisdiction) does not extend to Federal Reserve System banks 40
Foreign Assistance Act activities
Pursuant to the Budget and Accounting Act, 1921, as amended, 31 U.S.C. 712, 716(a) (formerly 31 U.S.C. 53(a)), and the Legislative Reorganizaton Act of 1970, as amended, 31 U.S.C. 716(b) (formerly 31 U.S.C. 115(a)), the General Accounting Office (GAO) is authorized to conduct comprehensive audits of activities under sec. 607(a) of the Foreign Assistance Act, as amended, 22 U.S.C. 2357(a), where Federal agencies directly participate in carrying out international agreements, such as those of the United States-Saudi Arabia Joint Commission on Economic Cooperation. Our audit authority extends to Joint Commission procurements and contacts even through the funding is wholly provided by Saudi Arabia 410

GENERAL ACCOUNTING OFFICE—Continued Page

Claims

Jurisdiction. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Claims)

Decisions

Overruled or modified

Prospective application

Transferred member of the Air Force may be reimbursed the cost of transporting the houseboat he uses as his dwelling under 37 U.S.C. 409, which permits the transportation at Government expense of a mobile home dwelling, because it is determined that a boat may qualify as a "mobile home dwelling" under the law. 48 comp. Gen. 147 is overruled and regulations issued to implement that decision need not be applied so as to exclude payment for transporting boats which are used as residences 292

Prospective application

The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended 308

Because so many agencies have relied on apparent acquiescence by the Congress during the appropriations process when funds for passenger vehicles were appropriated without imposing any limits on an agency's discretion to detemine the scope of "official business," and because dicta in GAO's own decisions may have contributed to the impression that use of cars for home-to-work transportation was a matter of agency discretion, GAO does not think it appropriate to seek recovery for past misuse of vehicles (except for those few agencies whose use of vehicles was restricted by specific Congressional enactments). This decision is intended to apply prospectively only. Moreover, GAO will not question such continued use of vehicles to transport heads of non-cabinet agencies and the respective seconds-in-command of both cabinet and non-cabinet agencies until the close of this Congress 438

Jurisdiction

Administrative determinations

The concept of administrative discretion does not permit an agency to refuse to consider all claims submitted to it under the Military Personnel and Civilian Employees' Claims Act, which authorizes agencies to settle claims of Government employees for loss or damage to personal property. While General Accounting Office will not tell another agency precisely how to exercise its discretion, that agency has a duty to actually exercise it, either by the issuance of regulations or by case-by-case adjudications 641

GENERAL ACCOUNTING OFFICE—Continued Page

Jurisdiction—Continued

Claims

Settlement

Authority

The Secretary of the Army denied a deceased civilian employee's representative's claim under 10 U.S.C. 2733 for wrongful death damages allegedly caused by malpractice of Army medical officials. As to the Comptroller General reporting the matter to Congress as a meritorious claim under 31 U.S.C. 3702(d) (formerly 31 U.S.C. 236), that provision is construed to apply only to claims which fall within General Accounting Office's (GAO) settlement authority. Since, under 10 U.S.C. 2733 and 2735, the Army's settlement of a claim for damages is final and conclusive, GAO has no authority in the matter and the claim is inappropriate for reporting to Congress under the Act..... 280

Commercial activities of Government

Private *v.* Government performance. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, In-house performance *v.* contracting out)**

Contracts

Contracting officer's affirmative responsibility determination

General Accounting Office review discontinued

Exceptions. (*See* **CONTRACTORS, Responsibility, Determination, Review by GAO)**

Defaults and terminations

Review of procedures leading to award

General Accounting Office will review a contracting agency's decision to terminate a contract for the convenience of the Government when that decision results from the agency's detemination that the contract award was improper 506

Disputes

Between private parties

Protest that a competitor allegedly used the protester's proprietary data in its proposal presents a dispute between private parties that is not for consideration under General Accounting Office's (GAO) Bid Protest Procedures where the contacting agency did not participate in the alleged disclosure of the data..... 577

Liquidated damages

Solicitation provisions

Performance Requirements Summaries in invitations for bids (IFBs) for services contracts which permit the Government to deduct from the contractor's payments an amount representing the value of several service tasks where a random inspection reveals a defect in only one task imposes an unreasonable penalty, unless the agency shows the deductions are reasonable in light of the particular procurement's circumstances..... 219

In-house performance *v.* contracting out

Cost comparison

Appeal of agency's analysis

Protest of Army's consideration of appeal of comparative cost analysis and agency's subsequent decision to sustain that appeal and to order new management study under Office of Management and Budget (OMB) Circular A-76 analysis is subject to General Account-

GENERAL ACCOUNTING OFFICE—Continued Page
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In-house performance *v.* contracting out—Continued
Cost comparison—Continued
Appeal of agency's analysis—Continued
ing Office review where solicitation establishes ground rules for the appeal process 129
Modification
While contract modifications generally are the responsibility of the procuring agency in administering the contract, General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was competed 22
Small business matters
Procurement under 8(a) program. (*See* CONTRACTS, Small business concerns, Awards, Review by GAO, Procurement under 8(a) program)
Small purchases. (*See* PURCHASES, Small)
Terminated for convenience of Government. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Defaults and terminations)
Criminal law violations. (*See* CRIMINAL LAW VIOLATIONS)
Discrimination
Complaints under Title VII
Civil Rights Act
Monetary awards
In view of authority granted to EEOC under Title VII of the Civil Rights Act of 1964, as amended, General Accounting Office (GAO) does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, GAO may determine the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII 239
Foreign Service Grievance Board decisions
An employee of the Agency for International Development (AID) filed a grievance with the Foreign Service Grievance Board under 22 U.S.C. 1037(a) for credit of unused sick leave earned while he was employed by a United Nations agency. The Board found for the employee. An AID certifying officer thereafter submitted the case to General Accounting Office for review and decision. Under 22 U.S.C. 1037a(13) such decisions of the Board are final, subject only to judicial review in the District Courts of the United States. Therefore, this Office is without jurisdiction to review the Board's decision in this case. 57 Comp. Gen. 299 is distinguished 671

GENERAL ACCOUNTING OFFICE—Continued Page

Jurisdiction—Continued

Labor-management relations

Requests for decisions

Declined

Under 4 C.F.R. 22.8 (1983) General Accounting Office (GAO) will not take jurisdiction over a labor-management matter which is "unduly speculative or otherwise not appropriate for decision." Since this case is based on factual issues which are irreconcilably in dispute, it would be more appropriately resolved through the grievance procedures set forth in the parties' negotiated labor-management agreement, or through negotiation. Therefore, under 4 C.F.R. 22.8 GAO will exercise its discretion to decline jurisdiction in this matter. 537

Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to General Accounting Office (GAO) and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter 274

Labor stipulations

Service Contract Act of 1965

Invitation for bids terms

Ambiguities. (*See* **BIDS, Invitation for bids, Ambiguous, Service Contract Act provisions**)

Military matters

Dependency

Under 37 U.S.C. 403(h) the Secretary of the service concerned may make dependency and relationship determinations for enlisted members' quarters allowance entitlements and the determinations are final and may not be reviewed by the General Accounting Office. However, that provision does not apply to officers and the Comptroller General renders decision in officers' cases and also in enlisted members' cases when requested by the service. In the interest of uniformity it seems appropriate to forward doubtful cases to the Comptroller General for decision particularly where an officer is married to an enlisted member. 60 Comp. Gen. 399 is modified 666

Relief authority

Treasurer of United States

Duplicate check losses

Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general, General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527(c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted 91

GENERAL ACCOUNTING OFFICE—Continued Page
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Subcontracts
Protests against award of subcontract on behalf of Government by Department of Energy prime contractor is appropriate for General Accounting Office review under standards of *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Nonunion protester, whose bid prime contractor did not open, is interested party, in particular circumstances, for purposes of protesting requirement for subcontractors to have union agreement notwithstanding that protester withdrew its bid. B-204037, Dec. 14, 1981, is amplified 428
Procedure
Bid protest cases
Resolution of protests
Not "adversary adjudication"
Claims under Equal Access to Justice Act
Recovery under the Equal Access to Justice Act of attorney's fees and costs incurred in pursuing a bid protest at General Accounting Office (GAO) is not allowed because GAO is not subject to the Administrative Procedures Act (APA) and in order to recover under Equal Access to Justice Act claimant must have prevailed in an adversary adjudication under the APA 86
Recommendations
Contracts
Termination
Partial
Sole domestic bidder submitted bid for quantity which was less than maximum specified in Invitation For Bids (IFB). Partial bid was authorized by IFB. Contracting officer applied Buy American Act evaluation factor against nondomestic bidder as to maximum quantity which nondomestic bidder bid on. Application of evaluation factor as to quantities on which domestic bidder submitted partial bid was proper. Application of evaluation factor as to quantities on which only foreign bids were submitted was improper. Partial termination of contract is recommended 345
Settlements
Authority
Federal Reserve System
Audit *v.* account settlement authority
General Accounting Office (GAO) will not decide protest against contract award by Federal Reserve Bank, despite GAO audit authority, because GAO account settlement authority (the basis of GAO bid protest jurisdiction) does not extend to Federal Reserve System banks 40

GENERAL SERVICES ADMINISTRATION
Authority
Space assignment. (*See* GENERAL SERVICES ADMINISTRATION, Services for other agencies, etc., Space assignment)
Strategic and Critical Stock Piling Act
Proposal by General Services Administration (GSA) to sell, on behalf of contractor, excess Stockpile materials under the Strategic and Critical Stock Piling Act, 50 U.S.C. 98e(c), where title has been

GENERAL SERVICES ADMINISTRATION—Continued Page
Authority—Continued
Strategic and Critical Stock Piling Act—Continued
transferred to the contractors in exchange for other needed Stockpile materials, is legally within the parameters of GSA's existing barter authority. Where a statute confers duties in general terms, all powers and duties incidental and necessary to make such authority effective are included by implication. Congress has encouraged barter transactions and the proposed plan helps accomplish the purposes of the Act. However, since it may have a significant effect on congressional control over the Stockpile transaction, GSA should discuss the proposal with its congressional oversight and appropriations committees before implementation 245
Procurement
Telephone equipment and related services
Installment purchase contract
Financial reporting
Capitalization
For the purpose of financial reporting GSA should capitalize equipment and installation portion of procurement characterized as a lease with an option to purchase (which in this case should be treated as an installment purchase contract), since it is clear that GSA intends to exercise option to take title to equipment at cost of $1 at expiration of 5-year contract term. Also, should GSA cancel contract, title to equipment would immediately vest in GSA and payment would be handled as provided for in the contract. See 2 GAO 12.5(d)... 569
Obligation of funds
Annual costs only
GSA under authority of 40 U.S.C. 481(a)(3) may obligate only the amount necessary to cover its annual costs under lease with an option to purchase contract (which in this case should be treated as an installment purchase contract) against the capital investment apportionment of the Federal Telecommunications Fund 569
Public utility services
Contract between General Services Administration (GSA) and a non-tariffed supplier for procurement of telephone equipment and related installation and maintenance services is one for "Public utility services" within the scope of 40 U.S.C. 481(a)(3) (authorizing GSA to make contracts for public utility services for periods up to 10 years), since it is the nature of the services provided and not the nature of the provider of the services that is determinative for the purpose of the law. Sale of telephone equiment is a utility type service. Installment purchase contracts as well as leases or leases with options to purchase are within the scope of 40 U.S.C. 481(a)(3) 569
Services for other agencies, etc.
Space assignment
Including leasing
Public Buildings Cooperative Use Act
Historic building preference
When applicable statute states that General Services Administration should acquire space in historic buildings when "feasible and prudent" compared with available alternatives, agency has not

GENERAL SERVICES ADMINISTRATION—Continued Page
Services for other agencies, etc.—Continued
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Including leasing—Continued
Public Buildings Cooperative Use Act—Continued
Historic building preference—Continued
abused its discretion or violated statute in making award to firm offering non-historic space at substantially lower price 50

GOVERNMENT PRINTING OFFICE
Status
Small Business Act purposes
Inapplicability of Act
The Government Printing Office is a legislative agency which is excluded from coverage of the Small Business Act. Therefore, its determination that a small business concern is nonresponsible need not be referred to the Small Business Administration for review under certificate of competency procedures 164

GRANTS
Comprehensive Employment and Training Act (CETA)
Subgrantees
Interest on grant funds
Where subgrantee of CETA grant to State of Arkansas earned interest on recovered FICA taxes before the recovery was returned to the Federal Government, the interest is an applicable credit under the grant agreement and grant cost principles. As a result, all interest earned by subgrantee on the recovery is owed to the grantee and by the grantee to the Department of Labor to the extent not offset by allowable grant costs 701
Where a subgrantee of State CETA grantee reovers grant funds and earns interest on recoveries, the interest is not held on advance basis and is not exempt from accountability under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a) 701
Federal
To states. (*See* STATES, Federal aid, grants, etc.)

HEALTH AND HUMAN SERVICES DEPARTMENT
Regulations
Procurement practices
Contractual preference to Indian organizations
Legality of preference
Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more is within competitive range is improper, since there is no legal basis for such a preference 353

HOLIDAYS
Compensation. (*See* COMPENSATION, Holidays)

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HOUSING AND URBAN DEVELOPMENT

Mortgage insurance programs

Special Risk Insurance Fund

Availability

Judgments and compromise settlements

Secretary of Housing and Urban Development (HUD) provided building mortgage insurance on two projects under authority of sec. 236 of the National Housing Act, 12 U.S.C. 1715z-1. In one case, the Secretary agreed to make payments to plaintiff construction contractor in settlement of lawsuit after court had ruled that the contractor had cause of action against the Secretary on the theory of *quantum meruit*. In the second case, similar payment was directed by court judgment. The permanent indefinite appropriation established by 31 U.S.C. 724a is not available in either case. The permanent appropriation may be used to pay a judgment or compromise settlement only if no other funds are available for that purpose. The Special Risk Insurance Fund, a revolving fund created by 12 U.S.C. 1715z-3(b), is available for the payments to contractors for completion of projects for which HUD has provided mortgage insurance under sec. 236..... 12

HUSBAND AND WIFE

Dependents

Quarters allowance. (*See* **QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ)**)

Separation agreements

Status

Members with dependents

A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic Allowance for quarters, even though the agreement was not issued or sanctioned by a court. However, a member's entitlement to basic allowance for quarters based on child support obligations created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody..... 315

INDEBTEDNESS

Collection. (*See* **DEBT COLLECTIONS**)

INDIAN AFFAIRS

Contracting with Government

Preference to Indian concerns

Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise..... 138

Health and Human Services Department. (*See* **HEALTH AND HUMAN SERVICES DEPARTMENT, Regulations, Procurement practices, Contractual preference to Indian organizations**)

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INSANE AND INCOMPETENT

Military personnel

Dependents

Annuity election for dependents

Survivor Benefit Plan. (*See* PAY, Retired, Survivor Benefit Plan, Mentally incapacitated beneficiaries)

Self-support status

A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the following period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military survivor annuity plans do not preclude reinstatment in appropriate circumstances. 44 Comp. Gen. 551 is modified in part 302

INSURANCE

Department of Housing and Urban Development

Mortgage insurance projects

Special Risk Insurance Fund. (*See* HOUSING AND URBAN DEVELOPMENT, Mortgage insurance programs, Special Risk Insurance Fund)

Household effects transported. (*See* TRANSPORTATION, Household effects, Insurance)

INTEREST

Dual Benefits Payment Account

Railroad Retirement Board. (*See* RAILROADS, Railroad Retirement Board, Dual Benefits Payment Account, Interest on funds)

Judgments. (*See* COURTS, Judgments, decrees, etc., Interest)

Paid to U.S. (*See* MISCELLANEOUS RECEIPTS, Interest)

INTERNATIONAL ORGANIZATIONS

International Natural Rubber Organization

Excess membership contributions

Retention and investment

General Accounting Office (GAO) has no legal objection to the retention of excess funds in an account where they will be invested by the INRO for the benefit of individual member governments, as the fund will be in custody of the INRO itself rather than of the United States. However, any earnings or interest from these investments received by the United States must be deposited in the Treasury as miscellaneous receipts 70

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JOINT TRAVEL REGULATIONS
Civilian personnel (Vol. 2)
Actual expenses
High rate areas
Meals, etc. cost reasonableness
Definitive guidelines needed
Volume 2 of Joint Travel Regs. does not specify across-the-board dollar limitation for purpose of determining reasonableness of actual subsistence claims for meals and miscellaneous expenses. In this case, accounting and finance officer considered a meal expense to be excessive and applied a dollar limitation to reimbursement. Absent sufficient justification for the higher dinner cost, that action is upheld. It is noted that provisions of 2 JTR para. C4611 limit meal and miscellaneous expenses reimbursement to 50 percent of high cost area rate in specific situations where lodging costs are not incurred. A similar limitation for application to subsistence expenses claims involving commercial lodging costs could be applied 88

JUDGES. (*See* **COURTS, Judges**)

LABOR-MANAGEMENT RELATIONS
Federal service
Requests for GAO decisions, etc.
Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay* retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information submitted, by 63 Comp. Gen. ——— (B-209414, Dec. 7, 1983) ... 151

Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay 216

Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to General Accounting Office (GAO) and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter 274

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective

LABOR-MANAGEMENT RELATIONS—Continued Page
Federal service—Continued
Requests for GAO decisions, etc.—Continued
to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a) 435
Under 4 C.F.R. 22.8 (1983) General Accounting Office (GAO) will not take jurisdiction over a labor-management matter which is "unduly speculative or otherwise not appropriate for decision." Since this case is based on factual issues which are irreconcilably in dispute, it would be more appropriately resolved through the grievance procedures set forth in the parties' negotiated labor-management agreement, or through negotiation. Therefore, under 4 C.F.R. 22.8, GAO will exercise its discretion to decline jurisdiction in this matter . 537

LEASES
Mineral
Public lands
Exchange agreements
Public land acquisition
Rattlesnake National Recreation Area and Wilderness Act
Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt 102
Negotiation
Evaluation of offers
Undisclosed factors
Oral disclosure during negotiations
When offeror is orally informed of an agency's requirement during negotiation, notwithstanding its absence in solicitation, offeror is on notice of the requirement and General Accounting Office will deny protest based on failure to state it in the solicitation 50
Historic building preference
Conditions for application
Omitted in solicitation
Cost consideration
Solicitation for lease of office space stating that preference will be given to space in historic buildings is deficient when it does not indicate how preference will be applied. However, protester cannot reasonably assume that preference is absolute and that an offer of historic space will be accepted over offer of non-historic space, regardless of price 50

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LEAVES OF ABSENCE
Administrative leave
Administrative determination
Retroactive application
The Merit Systems Protection Board asks whether administrative leave may be granted retroactively to employees who were ordered not to report for work during a brief partial shutdown of the agency. The employees were placed on half-time, half-pay status in order to forestall a funding gap which would have necessitated a full close-down. In its discretion, the Board has the authority to retroactively grant administrative leave with pay to the affected employees to the extent appropriated funds were available and adequate on the dates of the partial shutdown 1
Merit Systems Protection Board employees. (*See* **MERIT SYSTEMS PROTECTION BOARD)**
Annual
Accrual
Employees "stationed" outside United States
Recruited overseas
Employee of Department of Agriculture's Food and Nutrition Service was recruited from her place of permanent residence in the continental United States for assignment in Puerto Rico. Thus, she is eligible to accrue the 45 days of annual leave authorized by 5 U.S.C. 6304(b)(1) for individuals recruited or transferred from the United States or its territories or possessions for employment outside the area of recruitment or from which transferred 545
Agency policy, which purports to deny 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements 545
"Buying back"
After workers' compensation award
Forfeiture after leave adjustment
Administrative error effect
Employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from work-related illness accepted workers' compensation and bought back leave used. Upon reconstruction of the employee's leave records to show the recredit of the leave as of the time it was used, 66 hours of repurchased restored and regular annual leave were subject to forfeiture. Since the employing agency failed to apprise the employee of the possibility of forfeiture, the employee at his election may choose to be placed on annual leave for 1978 to avoid any or all of the forfeiture 253
Change of separation date for purpose of granting
Prohibition
Widow of former employee seeks to cancel employee's resignation on January 9, 1982, and substitute sick and annual leave until em-

LEAVES OF ABSENCE—Continued Page
Annual—Continued
Change of separation date for purpose of granting—Continued
Prohibition—Continued
ployee's death on July 3, 1982. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no evidence of administrative error, violation of policy or regulation, or contrary intent which would warrant a change in the employee's separation date 62
Restored
"Buying back"
After workers' compensation award
Forfeiture after leave adjustment
Employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from work-related illness accepted workers' compensation and bought back leave used. Upon reconstruction of the employee's leave record to show the recredit of the leave as of the time it was used, regular annual leave reinstated in excess of the maximum carryover stated in 5 U.S.C. 6304(a) is subject to forfeiture and may not be restored under 5 U.S.C. 6304(d). Previously restored leave recredited to leave year 1978 was subject to forfeiture at the end of leave year 1979 and therefore is not eligible for further restoration 253
Compensatory time
Aggregate salary limitation
Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. 5550a, despite the fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for Federal employees to earn and use compensatory time for religious purposes, Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute 589
Court
Jury duty
Firefighters
Overtime compensation
Fair Labor Standards Act applicability. (*See* COMPENSATION, Overtime, Firefighting, Fair Labor Standards Act, Court leave)
Witness
Employee-defendant
State or local government-plaintiff
Traffic violation
Employee who is summoned to county court for a traffic violation is not entitled to court leave as a witness under 5 U.S.C. 6322 in connection with his appearance in court as a defendant 87
Granting
Administrative determination
Employee who qualifies for maximum annual leave accumulation of 45 days under 5 U.S.C. 6304(b)(1) and has completed a basic period

LEAVES OF ABSENCE—Continued Page
Granting—Continued
Administrative determination—Continued
of 24 months continuous service abroad is entitled to accrue home leave under 5 U.S.C. 6305(a) on the basis of her continuous service. Although rate at which employee earned home leave was subject to agency interpretation of implementing regulations at 5 C.F.R. 630.604, agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted 545
Home leave. (*See* **OFFICERS AND EMPLOYEES, Overseas, Home leave**)
Time and attendance records
Retention (*See* **RECORDS, Retention**)
Traveltime
Excess
Annual leave charge
Where employee, who traveled by privately owned vehicle as a matter of preference and took additional time away from his official duties, is to be reimbursed at the constructive cost of rail transportation, the employee's annual leave may be charged for the work hours involved in the trip exceeding those hours which would have been required had he used rail transportation 393

LEGISLATION
Recommended by GAO
Presidential inaugural ceremonies
Participation by Federal agencies
Extent and types of participation
The Presidential Inaugural Ceremonies Act, now largely codified at 36 U.S.C. 721–730, is the primary legislation dealing with Presidential inaugurations. It authorizes Department of Defense (DOD) to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but even in these instances, the statute requires the PIC to indemnify the Government against losses. DOD itself recognizes that much of its extensive participation in Presidential inaugural activities is fundamentally a matter of custom rather than being rooted in legal authority. Nevertheless, Presidential inaugurations are highly symbolic national events and DOD support was provided with the knowledge and approval of many members of the Congress over a period of years. General Accounting Office recommends that the Congress provide specific legislative guidance on the extent and types of support and participation in inaugural activities which Federal agencies are authorized to provide 323
Statutory construction. (*See* **STATUTORY CONSTRUCTION**)

LOBBYING
Appropriation prohibition
Promoting public support or opposition
During a January 1981 training session at the LSC Denver Region, Alan Rader, a staff attorney with the Western Center on Law and Poverty in Los Angeles, an LSC grantee, gave a presentation on how he had organized a campaign with LSC funds to defeat a 1980 Cali-

LOBBYING—Continued Page

Appropriation prohibition—Continued

Promoting public support or opposition—Continued

fornia tax reduction ballot measure entitled "Proposition 9." He hired campaign coordinators and organized broad-based coalitions with community groups and agencies. This activity constitutes a violation of 42 U.S.C. 2996e(d)(4) which prohibits the Corporation and its grantees from using corporate funds to advocate or oppose ballot measures 654

Legislation

Use of Federal funds

During January 1981, the Denver Regional Office of the Legal Services Corporation (LSC) held a training session for grantee personnel of the region. The training session speakers included Corporation headquarters officials and officials from grantees, who presented material on the LSC Survival Plan. These officials advocated the public policy of resisting the threatened Reagan Administration cuts in the legal services and other social benefits programs. These same speakers encouraged those in attendance to engage in political activities of building coalitions in order to mount a grass roots campaign to lobby Congress to vote against measures to curtail these programs. This activity constituted a violation of 42 U.S.C. 2996f(b)(6) which prohibits the use of corporate funds by grantees to conduct training programs that advocate public policies or encourage political activities 654

The LSC held a training session in its Denver Region in January 1981. Representatives of grantees in the 5-state region attended. Corporate officials and grantee staff attorneys presented lectures and workshops on how grantees could build coalitions with community groups and agencies to form a grass roots organization to lobby Congress for legal services and other social benefit programs. Grantee representatives described coalition building projects that were underway. This activity constitutes a violation of 42 U.S.C. 2996f(b)(7) which prohibits grantees from using corporate funds to build organizations such as coalitions and networks 654

MARSHALS

Services

Property seizure

Storage costs. (*See* **APPROPRIATIONS, Availability, Seizure of private property *and* APPROPRIATIONS, Permanent indefinite, Unavailability, Storage charges**)

MEALS

Furnishing

General rule

Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or *quantum meruit,* applied as if contractor had not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines

MEALS—Continued Page
Furnishing—Continued
General rule—Continued
will be followed in future. Applying this approach, National Guard officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen. 595 419
Temporary duty
Day of departure. (*See* SUBSISTENCE, Actual expenses, Meals)

MEDICAL TREATMENT
Officers and employees
Travel expenses
Limitations
Administrative discretion
An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294

MEETINGS
Travel, etc. expenses
State officials
Use of appropriated funds by National Highway Traffic Safety Administration (NHTSA) to pay travel and lodging expenses of State officials to attend a proposed training workshop on odometer fraud is prohibited by 31 U.S.C. 1345 (formerly 551), as the proposed expenditures are not specifically provided for by the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1981 *et seq.* (1976), or other statute. Also, as this proposal is to be carried out by contract, the exception in our cases for grants does not apply. 35 Comp. Gen. 129 is distinguished 531

MERIT SYSTEMS PROTECTION BOARD
Employees
Administrative leave
Retroactive application
Administrative authority
Brief, partial office shutdown
The Merit Systems Protection Board asks whether administrative leave may be granted retroactively to employees who were ordered not to report for work during a brief partial shutdown of the agency. The employees were placed on half-time, half-pay status in order to forestall a funding gap which would have necessitated a full closedown. In its discretion, the Board has the authority to retroactively grant administrative leave with pay to the affected employees to the extent appropriated funds were available and adequate on the dates of the partial shutdown 1

LOBBYING—Continued Page
Appropriation prohibition—Continued
Promoting public support or opposition—Continued
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Officers and employees
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MILITARY PERSONNEL—Continued Page
Temporary duty
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel, Temporary duty)**
Transportation
Household effects. (*See* **TRANSPORTATION, Household effects, Military personnel)**
Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel)**

MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT (*See* **PROPERTY, Private, Damage, loss, etc., Personal property, Claims Act of 1964)**

MISCELLANEOUS RECEIPTS
Agency appropriation *v.* miscellaneous receipts
Amounts recovered under defaulted contracts
Disposition
Funding replacement contract
Excess costs of reprocurement recovered from a breaching contractor by the Bureau of Prisons may be used to fund a replacement contract. It is illogical to hold a contractor legally responsible for excess reprocurement costs and then not permit the recovery of those costs to be used for the purpose for which they were recovered. As long as the Bureau receives only the goods and services for which it bargained under the original contract, there is no illegal augmentation of the Bureau's appropriation. Therefore these funds need not be deposited into the Treasury as miscellaneous receipts. Comptroller General decisions to the contrary are modified 678
Interest
Investments
Interest/earnings paid to U.S.
Excess funds in international organization's custody
General Accounting Office (GAO) has no legal objection to the establishment of a separate account for deposit of excess funds pursuant to the International Natural Rubber Agreement under which the United States has management and investment control yet physical custody of the funds remains with the INRO. However, any funds actually received by Treasury must be deposited into miscellaneous receipts 70
Special account *v.* miscellaneous receipts
Refund of excess payments *v.* sale proceeds
Membership in international organizations
Repayments of money the United States has contributed to the International Natural Rubber Organization (INRO), which have been returned as excess due to the contributions of new members to the INRO or due to a reduction in the amount of rubber imported by the United States, are refunds and may be credited to the appropriation enacted for contributions to INRO. Repayments which constitute proceeds of the sale of rubber may not be credited to the account but must be deposited into the Treasury as miscellaneous receipts 70

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MISSING PERSONS ACT
Military personnel
Retired
Employed by Government contractors
Inapplicability of Act

A retired service member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. In the absence of statutory authority similar to the Missing Persons Act, 37 U.S.C. 551-557, which permits continued payments until the member presumed dead by declaration of the Department of Defense, payment of retired pay may not be made for any period after the last date the member was known to be alive and his retired pay account is to be placed in a suspense status until the member returns or until information is received or judicial action is taken to establish his death and the date of death 211

MOBILE HOMES
Transportation
Civilian personnel. (*See* TRANSPORTATION, Household effects, House trailer shipments, etc.)
Military personnel. (*See* TRANSPORTATION, Household effects, Military personnel, Trailer shipment)

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
Contracts
Research and development
Small business set-asides
Appropriation availability

In calculating its 1983 set-aside for small business innovation research program, National Aeronautics and Space Administration should apply definition of "research and development" that appears in Small Business Innovation Development Act, Pub. L. 97-219, 96 Stat. 217, July 22, 1982, to its budget for Fiscal Year 1983 without regard to appropriation heading "Research and Development." Since Congress clearly appropriated funds for certain operational activities under that heading, it would be contrary to congressional intent for set-aside to be based on amounts not available for research and development 232

NATIONAL GUARD
Civilian employees
Technicians
Severance pay

A National Guard member was denied reenlistment as a result of his refusal to attend training drills on Saturdays which required his removal as a civilian National Guard technician. He was dénied severance pay on the ground of delinquency in refusing to work on Saturdays. We hold that he is entitled to severance pay under 5 U.S.C. 5595 because his refusal to attend Saturday drills based on his religious beliefs was not delinquency within the meaning of the statute. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963) 625

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NUCLEAR REGULATORY COMMISSION
Adjudicative proceedings
Public intervenors
Appropriation availability. (*See* **APPROPRIATIONS, Availability, Intervenors**)

OFFICE OF PERSONNEL MANAGEMENT
Jurisdiction
Fair Labor Standards Act
Compliance determination
Review by GAO
Findings of fact

The Office of Personnel Management (OPM) has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no *bona fide* lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, for hours worked in excess of 40 in a week as no offset for lunch breaks may be made 58

OFFICERS AND EMPLOYEES
Administrative leave. (*See* **LEAVES OF ABSENCE, Administrative leave**)
Annual leave. (*See* **LEAVES OF ABSENCE, Annual**)
Compensation. (*See* **COMPENSATION**)
Contracting with Government
Former employees
Contracts with other than former employing agency
Conflict of interest statutes
Inapplicability of 18 U.S.C. 207(c)

Contrary to protester's allegation, there is no blanket prohibition on contracts between the Government and a former employee for a period of at least 1 year after former employee has left Government employment. Provisions contained in 18 U.S.C. 207(c) (Supp. IV, 1980), as implemented by 5 C.F.R. 737.11 (1981), generally restrict certain kinds of contact between former senior Government employees and their former agencies and do not apply to situation at hand where former employee of Veterans Administration is awarded contract by Department of the Navy 230

Public policy objectionability
Regulation restrictions
Violation criteria
Military procurements

Where contracting officer was unaware the awardee was employed by another Government agency on date of award, there was no violation of regulation against knowingly contracting with Government employee. Moreover, agency considered allegation when raised after award and determined that termination of contract for convenience of Government was not warranted since employment was terminat-

OFFICERS AND EMPLOYEES—Continued Page
Contracting with Government—Continued
Public policy objectionability—Continued
Regulation restrictions—Continued
Violation criteria—Continued
Military procurements—Continued
ed. In addition, General Accounting Office (GAO) finds no evidence in the record of any favoritism towards awardee. In these circumstances, GAO concludes that there is no reason to disturb award..... 230
Court leave. (*See* **LEAVES OF ABSENCE, Court)**
Discrimination alleged
Civil Rights Act, Title VII. (*See* **CIVIL RIGHTS ACT, Title VII, Discrimination complaints)**
Excusing from work. (*See* **LEAVES OF ABSENCE, Administrative leave)**
Grievances
Grievance examiners
Determinations
Review by GAO
Per diem claim
Employee of Forest Service grieved entitlement to per diem in connection with assignment to seasonal worksite every 6 months. We agree with the Grievance Examiner's factual determination that the employee was in a temporary duty status and therefore entitled to per diem as provided for in the Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employees maintained their permanent homes at their official duty station while living in Government quarters at the seasonal worksite..... 80
Health services. (*See* **MEDICAL TREATMENT, Officers and employees)**
Home leave. (*See* **OFFICERS AND EMPLOYEES, Overseas, Home leave)**
Household effects
Transportation. (*See* **TRANSPORTATION, Household effects)**
Leaves of absence. (*See* **LEAVES OF ABSENCE)**
Mileage. (*See* **MILEAGE)**
New appointments
Relocation expense reimbursement and allowances
Manpower shortage category
Real estate expenses
A Commissioned Officer in the Public Health Service (PHS) was separated from the officer corps and recruited to fill a manpower shortage position in the Veterans Administration. Employee seeks reimbursement of real estate expenses occasioned by sale of his old residence in Maryland and purchase of new residence in California. Reimbursement is denied because as a commissioned officer in the PHS, employee was a member of a uniformed service whose pay and allowances are prescribed by Title 37 of U.S. Code, which does not provide for such reimbursement. Consequently, claimant was not embraced by reimbursement provisions of sections 5721–5733 of Title 5, applicable to civilian employees of Government only. Thus, purported transfer was a separation from uniformed service followed by sub-

OFFICERS AND EMPLOYEES—Continued Page

New appointments—Continued

Relocation expense reimbursement and allowances—Continued

Manpower shortage category—Continued

Real estate expenses—Continued

sequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees 462

Overpayments

Waiver

Debt collections. (*See* **DEBT COLLECTIONS, Waiver, Civilian employees**)

Overseas

Home leave

Entitlement

Employee who qualifies for maximum annual leave accumulation of 45 days under 5 U.S.C. 6304(b)(1) and has completed a basic period of 24 months continuous service abroad is entitled to accrue home leave under 5 U.S.C. 6305(a) on the basis of her continuous service. Although rate at which employee earned home leave was subject to agency interpretation of implementing regulations at 5 C.F.R. 630.604, agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted 545

Agency policy, which purports to deny 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements 545

Renewal agreement travel expenses. (*See* **TRAVEL EXPENSES, Overseas employees, Renewal agreement travel**)

Travel expenses. (*See* **TRAVEL EXPENSES, Overseas employees**)

Overtime. (*See* **COMPENSATION, Overtime**)

Per diem. (*See* **SUBSISTENCE, Per diem**)

Personal property damage, loss, etc. (*See* **PROPERTY, Private, Damage, loss, etc., Personal property**)

Quarters allowance

Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Temporary quarters**)

Relocation expenses

Transferred employees

Real estate expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses**)

Resignation

Separation date changes

Widow of former employee seeks to cancel employee's resignation on January 9, 1982, and substitute sick and annual leave until employee's death on July 3, 1982. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no

OFFICERS AND EMPLOYEES—Continued Page

Resignation—Continued

Separation date changes—Continued

evidence of administrative error, violation of policy or regulation, or contrary intent which would warrant a change in the employee's separation date 620

Voluntary *v.* involuntary

Federal Trade Commission (FTC) announced that it was closing several regional offices, and employees of these offices were given specific notice that their jobs would be abolished pursuant to a reduction-in-force (RIF). After several employees submitted written resignations, the FTC reversed its decision, did not close the regional offices, and canceled the RIF. The employees separated from service after the RIF was canceled. Hence, they are not entitled to severance pay since their resignations were voluntary and could have been withdrawn. Civil Service Regulations state that employees are not eligible for severance pay if at the date of separation they decline an offer of an equivalent position in their commuting area, and the option to remain in the same position is equally preclusive. 5 C.F.R. 550.701(b)(2) 171

Senior Executive Service

Bonuses, awards, etc.

Fiscal Year 1982 bonuses and presidential rank awards were paid to members of the Senior Executive Service (SES) at various times depending on the particular agency's payment schedule. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award is considered paid on the date of the Treasury check 675

Career Senior Executive Service members who receive presidential rank awards under 5 U.S.C. 4507 are entitled to either $10,000 or $20,000, subject to the aggregate amount limitation in 5 U.S.C. 5383(b). For Fiscal Year 1982 rank award recipients who received a reduced initial payment by Treasury check dated on or after Oct. 1, 1982, an agency is required to make a supplemental payment up to the full entitlement, limited only by the new Executive Level I pay ceiling of $80,100. No supplemental payment may be made if the check is dated before Oct. 1, 1982 675

Performance awards (bonuses) may be paid to career Senior Executive Service members under 5 U.S.C. 5384, not to exceed 20 percent of annual basic pay and subject to the aggregate limitation in 5 U.S.C. 5383(b). If a bonus was paid by Treasury check dated on or after Oct. 1, 1982, an agency may, in its discretion, make a supplemental payment limited only by the new Executive Level I ceiling of $80,100, provided the bonus amount was calculated on a percentage basis. No supplemental payment may be made if the check is dated before Oct. 1, 1982 675

Severance pay. (*See* **COMPENSATION, Severance pay**)

Sick leave. (*See* **LEAVES OF ABSENCE**)

Temporary duty

Per diem. (*See* **SUBSISTENCE, Per diem**)

OFFICERS AND EMPLOYEES—Continued Page

Transfers

House trailers, mobile homes, etc. (*See* TRANSPORTATION, Household effects, House trailer shipments, etc.)

Household effects transportation. (*See* TRANSPORTATION, Household effects)

Leases

Unexpired lease expense

Reimbursement

Governed by terms of lease

To settle lease which did not contain termination clause, transferred employee paid rent for unexpired 4½ month term of lease. Employee is entitled to full amount of lease settlement expenses paid in avoidance of potentially greater liability. Reimbursement is not diminished by agency's finding that it is customary for landlord to refund rent when he has relet premises during unexpired term of lease since reimbursement is governed by terms of lease and not what is customary in locality 319

Miscellaneous expenses

Catalytic converters

Installed in automobiles

Cost of reconnecting, etc.

Department of Defense civilian employees participating in a Privately Owned Vehicle Import Control Program may be reimbursed for cost of reinstallation of catalytic converters upon reentry of vehicles into the United States. Cost of securing a bond allowing the vehicle to be admitted to the United States incurred by nonparticipants may also be reimbursed since it is required for those who do not participate in the program. B-163107, May 18, 1973, is distinguished 282

Members of the uniformed services are reimbursed miscellaneous expenses incurred incident to a permanent change under 37 U.S.C. 407, a set allowance, which does not require an itemization of the expenses. Accordingly, no authority exists for any additional reimbursement of the costs of reconnecting a catalytic converter or the costs of securing a bond to allow the vehicle to be admitted to the United States on return from an overseas assignment. B-163107, May 18, 1973, is distinguished 282

Mobile home dwelling purchase, etc.

Employee may be reimbursed, in connection with the purchase of a sailboat to be occupied as a residence upon transfer of station, those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the operation of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2-3.1b 289

Real estate expenses

Finance charges

Reimbursement prohibition

Veterans Administration funding fee

The Veterans Administration (VA) questions whether the VA funding fee, consisting of one-half of 1 percent of the amount of a loan guaranteed or insured by the VA, required under the Omnibus Budget Reconciliation Act of 1982, is reimbursable under para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981)

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Real estate expenses—Continued
Finance charges—Continued
Reimbursement prohibition—Continued
Veterans Administration funding fee—Continued
(FTR), as amended. We hold that the funding fee is not reimbursable under FTR para. 2-6.2d because the fee constitutes a finance charge under Regulation Z (12 C.F.R. 226.4 (1982)) 456

Former residence utilized as a downpayment
Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement of $163 premium paid for title insurance on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement of the fee paid for title insurance under "total financial package" concept enunciated in *Arthur J. Kerns,* 60 Comp. Gen. 650 (1981), and subsequent similar decisions 426

Loan origination fee
Employee may be reimbursed the loan origination fee he incurred incident to purchasing a house on December 1, 1982, at his new duty station since paragraph 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended, specifically authorizes reimbursement for such a fee. Revised FTR para. 2-6.2d represents a change from the predecessor regulations, as interpreted by decisions of this Office, in that it specifically allows reimbursement for a fee that may constitute a finance charge within the meaning of Regulation Z, (12 C.F.R. 226.4(a) (1982). Nevertheless, the revised regulation is consistent with the authorizing legislation in 5 U.S.C. 5724a(a)(4) (1976), and, therefore, will be followed by this Office 534

Time limitation
Regulation amendment
Employee is not entitled to reimbursement for real estate expenses incurred in connection with his permanent change of station from New Cumberland, Pa., to Warren, Mich., on May 19, 1980, since settlement date did not occur within 2 years of date on which employee reported to new duty station as required by FTR para. 2-6.1e (May 1973). The amendment to FTR para. 2-6.1e, allowing 1 year extension of 2-year time limitation for completion of residence transactions, is effective only for employees whose entitlement period had not expired prior to Aug. 23, 1982. Since the employee's entitlement period expired prior to that date, the amendment is not applicable 264

Relocation expenses
Leases. (*See* **OFFICERS AND EMPLOYEES, Transfers, Leases)**
Miscellaneous expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Miscellaneous expenses)**
New appointees. (*See* **OFFICERS AND EMPLOYEES, New appointments, Relocation expense reimbursement and allowances)**

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Temporary quarters
Subsistence expenses
Computation of allowable amount
A transferred employee reclaims $25 per day for temporary quarters while residing with friends at new duty station. Agency disallowed amount claimed as unreasonable in view of lack of documentation to substantiate basis for the $25 or to establish that host family did incur extra expenses. Under Federal Travel Regs. para. 2-5.4c, agency provided a formula under which maximum reimbursement was $375 for 10-day period in question. Since employee has been reimbursed $343.22 for meal subsistence expenses, maximum available for lodging is $31.78 for 10-day period. Therefore, agency requirement for substantiation of $25 per day does not appear to be germane. Employee need only support lodging expense of friends for $31.78 for 10-day period. We find amount reasonable based upon use of host's utilities, cleaning services and linens 401
Entitlement
Delays en route to new station
Employee who performed travel incident to transfer of duty station was delayed by breakdown of mobile home in which he and his family were traveling. On basis of such delay, he claimed temporary quarters expenses for a 6-day period during which the mobile home was being repaired. Temporary quarters expenses may not be paid since, for the period of actual travel en route to the new station, the employee's rights are limited by 5 U.S.C. 5724a to an appropriate per diem allowance rather than temporary quarters expenses 629
Transportation
Household effects. (*See* TRANSPORTATION, Household effects)
Travel by foreign air carriers. (*See* TRAVEL EXPENSES, Air travel, Fly America Act)
Travel expenses. (*See* TRAVEL EXPENSES)

OMNIBUS RECONCILIATION ACT OF 1981
Dual Benefits Payment Account
Railroad Retirement Board. (*See* RAILROADS, Railroad Retirement Board, Dual Benefits Payment Account)

PANAMA CANAL
Employees
Panama Canal employment system. (*See* COMPENSATION, Panama Canal employment system)

PAY
Active duty
Concurrent retired, etc. pay
An Air Force officer who is removed from the temporary disability retired list and placed on the active duty list for 1 day on the 31st day of the month, and retired for years of service the next day, is entitled to a full month's retired pay in addition to pay for the 1 day of active duty 266

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Additional

Diving duty

Requirements

To qualify for special pay for diving duty, under 37 U.S.C. 304(a), an individual must be assigned to, maintain a proficiency in, and actually perform diving duty. Each requirement must be met before special pay begins to accrue. Therefore, where a member was assigned to duty as a student at Officer Candidate School during which he did not actually perform diving duty, although he may have met the other requirements, he may not receive special pay. 37 Comp. Gen. 546 is distinguished 612

From sources other than United States

Jury fees

Duty in State courts. (*See* **COURTS, Jurors, Fees, Military personnel in State courts**)

Missing, interned, etc. persons

Retired pay

Suspension

Pending date of death establishment

Retiree in private employment

A retired service member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. In the absence of statutory authority similar to the Missing Persons Act, 37 U.S.C. 551–557, which permits continued payments until the member is presumed dead by declaration of the Department of Defense, payment of retired pay may not be made for any period after the last date the member was known to be alive and his retired pay account is to be placed in a suspense status until the member returns or until information is received or judicial action is taken to establish his death and the date of death 211

Readjustment payment to reservists on involuntary release

Separation pay in lieu of

Pub. L. 96–513

The Joint Travel Regulations, Vol. 1, may be amended to include travel and transportation allowances to a home of selection for a member discharged or released from active duty with separation pay under 10 U.S.C. 1174 (Supp. IV, 1980). A statute must be read in the context of other laws pertaining to the same subject and should be interpreted in light of the aims and designs of the total body of law of which it is a part 174

Retired

Annuity elections for dependents

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

Computation

Alternate method

Public Law 94–106 effect

An Army officer, after completing over 30 years of active service, who could have retired with retired pay unconditionally resigned from the military in 1961. Subsequently, the Army Board for Correction of Military Records corrected the officer's record to show that he retired in Feb. 1982. His situation falls within the provisions of 10

PAY—Continued Page
Retired—Continued
Computation—Continued
Alternate method—Continued
Public Law 94–106 effect—Continued
U.S.C. 1401a(f) for the computation of his retired pay since he initially retired in 1982 and initially became entitled to retired pay at that time. However, under that section the 1972 basic pay rates (which would be most advantageous to him) in computing his retired pay may not be used because he was not a member of the Army in 1972. Thus, he could not have retired then and had no grade or basic pay rate for use in computing retired pay 406
Pub. L. 96–342
Pay base establishment
Erroneous payments' exclusion
Erroneous payments of basic pay should not be included in the computation of a service member's retired pay base for purposes of computing his retired pay entitlement under 10 U.S.C. 1407. Although that statute provides that retired pay base will be computed on basic pay "received" over a period of months of active duty, that is construed to mean only basic pay the member was legally entitled to receive 157
Forfeitures and demotions' effect
A service member's retired pay base, upon which his retired pay is computed, is an average of basic pay he "received" on active duty over a period of months. Reductions in the basic pay received because of forfeitures and demotions must be included in computing the pay "received" to determine the retired pay base 157
"Saved pay rate" under 10 U.S.C. 1401a(e)
Applicability
The provisions of 10 U.S.C. 1401a(e), applicable to computation of retired pay, allow the use of basic pay rates in effect on the day before the effective date of the rates of basic pay on which the member's retired pay would otherwise be based plus appropriate cost-of-living increases. This provision was enacted at a time when retired pay was computed only under the old system where it is based on a single specific rate of basic pay. However, there is no indication of legislative intent that it should not also apply to the new system of basing retired pay on average of pay received over a period of months. Therefore, as long as it may reasonably be applied under the new system, it should be applied when advantageous to the retired member 157
Foreign employment
Congressional consent
Pub. L. 95–105
Applicability
Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Art. I, sec. 9, cl. 8 of the Constitution and the approvals required by section 509 of Public Law 95–105 (37 U.S.C. 801 note) in

PAY—Continued Page
Retired—Continued
Foreign employment—Continued
Congressional consent—Continued
Pub. L. 95–105—Continued
Applicability—Continued
order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government 432
Increases
Cost-of-living increases
Adjustment of retired pay
Pub. L. 96–342
Cost-of-living adjustments to military retired pay under 10 U.S.C. 1401a(b) which are based on the periodic cost-of-living adjustments made in Civil Service annuities also apply to military retired pay computed on the new retired pay base system provided for by 10 U.S.C. 1407 157
Partial adjustments
Pub. L. 96–342
Partial cost-of-living adjustments under 10 U.S.C. 1401a (c) and (d) made in military retired pay when the member first becomes entitled to retired pay should be applied to military retired pay based on averaging of pay received under 10 U.S.C. 1407 as long as it is reasonably possible to do so. The partial cost-of-living adjustment provisions were enacted to apply to retired pay computed under the old system in which retired pay is based on a single specific rate of basic pay; however, there is no indication of legislative intent that they should not also be applied to retired pay computed under the new retired pay base system 157
Non-Regular service
Post-age 60 application
Date of pay accrual
***Garcia* case**
A service member filed an application for non-Regular retired pay under 10 U.S.C. 1331 almost 6 years after meeting the age requirement, but retired pay was not granted because records did not show he had sufficient years of service. Upon his submission of additional proof, it was determined that he had sufficient service. Although more than 6 years elapsed between his meeting the age requirement and the determination that he was eligible for retired pay, none of his retroactive retired pay is barred by 31 U.S.C. 71a (now sec. 3702(b)), in view of *Garcia* v. *United States,* 617 F.2d 218 (Ct. Cl. 1980), since such claims will now be deemed to accrue only after the service's determination that the claimant has the required service..... 227
Reservists
Waiver of retired pay
Reserve duty on thirty-first day of the month
Retired members of the armed services who perform Reserve duty, active or inactive, on the 31st day of a calendar month must waive 1 day's retired pay (or other compensation received on account of their prior service) in order to be entitled to active duty pay or inactive

PAY—Continued Page
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Reservists—Continued
Waiver of retired pay—Continued
Reserve duty on thirty-first day of the month—Continued
duty pay which would otherwise accrue for that day. This is required by 10 U.S.C. 684 266
Service credits. (*See* **PAY, Service credits**)
Survivor Benefit Plan
Beneficiary payments
Handicapped beneficiaries
Implementing national employment policy
In view of the current national policy concerning employment of the handicapped, as reflected in law and executive proclamation, military survivor annuity plans should not be applied in a manner that would discourage handicapped beneficiaries from seeking employment, or would result in the permanent termination without notice of the annuity of one who is attempting to become self-sufficient through gainful employment. Procedures should be established to implement that policy. Further, if an annuity is suspended because the beneficiary is determined to be capable of self-support, but the original disabling condition causes a recurring loss of self-sufficiency, we will consider whether the annuity may be reinstated in an appropriate case 193
Mentally incapacitated beneficiaries
Effect of incapacity on payments
Under the rules of agency, a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. Hence, Survivor Benefit Plan annuity payments may not be made to an agent designated in a power of attorney which was signed by an annuitant known to be suffering from mental illness but not adjudged incompetent, since in the circumstances the validity of the power of attorney is too doubtful to serve as a proper basis for a payment from appropriated funds. 44 Comp. Gen. 551 is modified in part 302
Survivor Benefit Plan annuity payments in the case of an adult beneficiary known to be suffering from mental illness, but not adjudged incompetent, may be made directly to the beneficiary if by psychiatric opinion the beneficiary is considered sufficiently competent to manage the amounts due and to use the annuity properly for personal maintenance. Otherwise, the amounts due should remain unpaid and credited on account until a guardian authorized to receive payment is appointed by a court. 44 Comp. Gen. 551 is modified in part 302
Suspension and reinstatement
Mentally incapacitated beneficiaries' employment
A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the fol-

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Retired—Continued
Survivor Benefit Plan—Continued
Beneficiary payments—Continued
Suspension and reinstatement—Continued
Mentally incapacitated beneficiaries' employment—Continued
lowing period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military survivor annuity plans do not preclude reinstatement in appropriate circumstances. 44 Comp. Gen. 551 is modified in part 302
Children
Born after election
If a Survivor Benefit Plan participant with dependent child annuity coverage acquires a new dependent child after all of his other children have become ineligible for an annuity and all cost assessments for their coverage have been terminated, the newly acquired child is eligible for an annuity even if the participant fails to notify the concerned finance center of the child's existence. However, in that situation the delinquent costs would have to be collected before annuity payments could commence 553
Cost of coverage
Actuarial basis
Statutory provisions of the Survivor Benefit Plan direct that costs of dependent child annuity coverage be assessed "by an amount prescribed under regulations of the Secretary of Defense." Consistent with express Congressional intent, the regulations prescribe computation of those costs on an actuarial basis in which the ages of the Plan participant and his eligible dependents are used. When a Plan participant acquires a dependent child and he has no other children remaining who are eligible for an annuity, those costs are to be reinstated, computed under that prescribed method based on the age of the newly acquired child 553
Dependency status
Mental incapacity during school year
Under the Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suffered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 44 Comp. Gen. 551 is modified in part 302
Physically handicapped adults
Dependency status during employment
The adult daughter of a deceased Navy officer received a Survivor Benefit Plan annuity under 10 U.S.C. 1447(5)(B)(iii) based on a determination that she was incapable of self-support because of physical incapacity. She was quadraplegic as the result of childhood polio. Despite this disability, she later secured full-time Government employ-

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Retired—Continued
Survivor Benefit Plan—Continued
Children—Continued
Physically handicapped adults—Continued
Dependency status during employment—Continued
ment in a grade GS-5 position. This does not warrant suspension of the annuity on the basis that she is no longer incapable of self-support, even though a grade GS-5 salary would normally be sufficient to cover the living expenses of a physically fit person, since that salary is not sufficient for her own personal needs 193

Post-participation election changes of member
In August 1981, the Congress granted a 1-year "open enrollment" period under the Survivor Benefit Plan for retired military personnel who had previously elected to participate in the Plan at less than the maximum level, or not to participate at all. However, the "open enrollment" legislation did not give personnel who were already participating in the Plan the option of either reducing the level of their participation or withdrawing from the program. Consequently, that legislation did not authorize a Plan participant to revoke the full dependent child annuity coverage he had previously elected to have 553

Guaranteed minimum income
The Survivor Benefit Plan, 10 U.S.C. 1447-1455, is an income maintenance program for the surviving dependents of deceased service members. If a member elects to have dependent child annuity coverage when he becomes a participant in the Plan, that coverage is not limited to children he has at the time of the election, but extends automatically and involuntarily to any child he thereafter acquires. Hence, annuity coverage automatically extended to the son acquired by birth in 1981 following a remarriage by a retired Army officer who had elected to have dependent child coverage when he became a Plan participant in 1973 553

Spouse
Social Security offset
Computation
Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment 471

Termination or reduction
Children's benefits
The election made by a retired service member who is married and has dependent children to participate in the Survivor Benefit Plan with full spouse and dependent child annuity coverage is binding and may not be unilaterally revoked by him, so that a retired Army officer who elected to have such coverage in 1973 could not, after divorce and remarriage, withhold dependent child annuity coverage from a

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Termination or reduction—Continued
Children's benefits—Continued
son he acquired in 1981 even though by that time the only dependent child he had in 1973 was no longer eligible for an annuity 553
Service credits
Absences due to misconduct, etc.
Retired pay purposes
Pub. L. 96-342 effect
Pay base computation
A period of unauthorized absence, for which a service member forfeits pay, generally should not be included in computing the member's retired pay base unless such period may also be included in the member's years of service and thus the percentage multiplier (2½ percent per year) used in computing retired pay 157
Severance
Separation pay in lieu of
Pub. L. 96-513
The Joint Travel Regulations, Vol. 1, may be amended to include travel and transportation allowances to a home of selection for a member discharged or released from active duty with separation pay under 10 U.S.C. 1174 (Supp. IV, 1980). A statute must be read in the context of other laws pertaining to the same subject and should be interpreted in light of the aims and designs of the total body of law of which it is a part 174
Special (*See* PAY, Additional)
Thirty-first day of the month
Active duty for part of month
An Air Force officer who is removed from the temporary disability retired list and placed on the active duty list for 1 day on the 31st day of the month, and retired for years of service the next day, is entitled to a full month's retired pay in addition to pay for the 1 day of active duty 266
Reserve duty
Computation of pay
Retired members of the armed services who perform Reserve duty, active or inactive, on the 31st day of a calendar month must waive 1 day's retired pay (or other compensation received on account of their prior service) in order to be entitled to active duty pay or inactive duty pay which would otherwise accrue for that day. This is required by 10 U.S.C. 684 266

PAYMENTS
Items of $25 or less
Claims amounting to $25 or less should normally be handled by certifying and disbursing officers under procedures authorized in letter of July 14, 1976, and need not be submitted to the Comptroller General for decision. B-189622, Mar. 24, 1978, is distinguished 168
Progress. (*See* CONTRACTS, Payments, Progress)

PAYMENTS—Continued Page
Prompt Payment Act
Waiver of payment
Propriety
A Government contractor may waive an interest penalty payment issued to it under the Prompt Payment Act either by an express written statement or by acts and conduct which indicate an intent to waive 673
Quantum meruit/valebant basis
Absence, etc. of contract
Government acceptance of goods/services
When goods are furnished or services rendered to the Government, but the contract provision under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or services under an implied contract 337
Voluntary
No basis for valid claim
Exception
Public necessity
Payment in Government's interest
Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or *quantum meruit,* applied as if contractor had not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines will be followed in future. Applying this approach, National Guard officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen. 595 419
Supervisory, etc., direction
Claim for reimbursement of personal funds used to pay for repair of telephone answering system may be paid. Since the procurement of the repair services was authorized by superiors it would be unfair for the Government to retain the advantages of the services without repaying claimant. 62 Comp. Gen. 419 is distinguished 595

PERSONAL FURNISHINGS. (*See* CLOTHING AND PERSONAL FURNISHINGS, Special clothing and equipment)

PRESIDENT
Inaugural ceremonies
Inaugural balls
Status
Private gatherings
Presidential inaugural balls are basically private gatherings or parties not generally available to the community, whose proceeds go to the private, non-Government PIC. They are neither official civil ceremonies nor official Federal Government functions under the DOD's community relations regulations (32 C.F.R. Parts 237 and 238).

PRESIDENT—Continued Page
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Inaugural balls—Continued
Status—Continued
Private gatherings—Continued
Therefore, DOD's appropriated funds are not available to cover the costs of participation by any of its employees or members 323
Participation by Federal agencies
Defense Department
The Presidential Inaugural Ceremonies Act, now largely codified at 36 U.S.C. 721–730, is the primary legislation dealing with Presidential inaugurations. It authorizes Department of Defense (DOD) to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but even in these instances, the statute requires the PIC to indemnify the Government against losses. DOD itself recognizes that much of its extensive participation in Presidential inaugural activities is fundamentally a matter of custom rather than being rooted in legal authority. Nevertheless, Presidential inaugurations are highly symbolic national events and DOD support was provided with the knowledge and approval of many members of the Congress over a period of years. General Accounting Office recommends that the Congress provide specific legislative guidance on the extent and types of support and participation in inaugural activities which Federal agencies are authorized to provide 323
Appropriation availability
Section 601 of the Economy Act, as amended, 31 U.S.C. 686 (now 31 U.S.C. 1535), permits one agency or bureau of the Government to furnish materials, supplies or services for another such agency or bureau on a reimbursable basis. However, since the Presidential Inaugural Committee (PIC) is not a Government agency and DOD used its own appropriations without reimbursement from either the PIC or Joint Congressional Committee on Inaugural Ceremonies in participating in the 1981 Presidential inaugural activities, the authority of the Economy Act was not available 323
Participation in the inaugural ceremony and in the inaugural parade can be justified on the basis of its obvious significance for DOD, as well as for other Federal agencies. However, each agency may only incur and pay expenses directly attributable to the participation of its own employees. It is therefore improper for DOD, in the absence of specific statutory authority, to pay such costs as housing of high school band participants in the parade, lending military jeeps to pull floats provided by non-military organizations, providing administrative and logistical support to PIC offices, etc 323
Use of military personnel for VIPs and other non-military persons in the capacity of chauffeurs, personal escorts, social aides and ushers is improper under the general appropriations law principles and under DOD's community relations regulations. See 32 C.F.R. Parts 237 and 238 323
Presidential inaugural balls are basically private gatherings or parties not generally available to the community, whose proceeds go to the private, non-Government PIC. They are neither official civil

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Inaugural ceremonies—Continued
Participation by Federal agencies—Continued
Defense Department—Continued
Appropriation availability—Continued
ceremonies nor official Federal Government functions under the DOD's community relations regulations (32 C.F.R. Parts 237 and 238). Therefore, DOD's appropriated funds are not available to cover the costs of participation by any of its employees or members..... 323

PRESIDENTIAL INAUGURAL CEREMONIES ACT (*See* **PRESIDENT, Inaugural ceremonies**)

PRISONS AND PRISONERS
Federal Prison Industries
Products
Requirement of Federal agencies to purchase
Exceptions
Forest Service, Department of Agriculture, is not required to request clearance from Federal Prison Industries Incorporated (FPI) when making purchases from private sources using funds appropriated by Public Law 98-8. 18 U.S.C. 4124 generally requires Federal agencies to buy all FPI products which meet their requirements from FPI rather than from private sources. Public Law 98-8 (98th Cong., 1st sess., 97 Stat. 13 (March 24, 1983)) is an emergency measure which appropriates funds for projects designed to combat the economic recession occurring at the time of its passage. Specific legislation prevails over general. Since private purchases further the Act's purposes the requirement to purchase from FPI does not apply..... 617

PROCUREMENT
Bids. (*See* **BIDS**)

PROMPT PAYMENT ACT. (*See* **PAYMENTS, Prompt Payment Act**)

PROPERTY
Private
Damage, loss, etc.
Personal property
Claims Act of 1964
Settlement authority
The concept of administrative discretion does not permit an agency to refuse to consider all claims submitted to it under the Military Personnel and Civilian Employees' Claims Act, which authorizes agencies to settle claims of Government employees for loss or damage to personal property. While General Accounting Office will not tell another agency precisely how to exercise its discretion, that agency has a duty to actually exercise it, either by the issuance of regulations or by case-by-case adjudication..... 641

Seizure
Costs incurred
Appropriation availability. (*See* **APPROPRIATIONS, Availability, Seizure of private property**)
Public
Exchanges
Strategic and critical materials. (*See* **STRATEGIC AND CRITICAL MATERIALS, Barter exchange**)

PUBLIC HEALTH SERVICE Page

Commissioned personnel

Separation

Subsequent appointment to civilian position

Relocation expense reimbursement and allowances

A Commissioned Officer in the Public Health Service (PHS) was separated from the officer corps and recruited to fill a manpower shortage position in the Veterans Administration. Employee seeks reimbursement of real estate expenses occasioned by sale of his old residence in Maryland and purchase of new residence in California. Reimbursement is denied because as a commissioned officer in the PHS, employee was a member of a uniformed service whose pay and allowances are prescribed by Title 37 of U.S. Code, which does not provide for such reimbursement. Consequently, claimant was not embraced by reimbursement provisions of sections 5721-5733 of Title 5, applicable to civilian employees of Government only. Thus, purported transfer was a separation from uniformed service followed by subsequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees 462

PUBLIC LANDS

Acquisition

Exchange agreements

Bidding rights

As basis for State payments

Mineral Lands Leasing Act requirements

Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt 102

PURCHASES

Small

Small business concerns

Certificate of Competency procedures under SBA

Applicability

Change in SBA regulations

Where protester has not objected to contracting officer's failure to refer small business non-responsibility determination to the Small Business Administration (SBA) for consideration under its Certificate of Competency procedures, GAO will not object to such failure to refer since the contracting officer's action was consistent with a Defense Acquisition Regulation which provides that such referral shall not be made when small purchase procedures are used, and since

PURCHASES—Continued Page
Small—Continued
Small business concerns—Continued
Certificate of Competency procedures under SBA—Continued
Applicability—Continued
Change in SBA regulations—Continued
current SBA regulations provide that it is within the contracting officer's discretion to refer when contract value is less than $10,000 213

QUARTERS
Government-furnished
Members of uniformed services
Basic allowance entitlement. (*See* QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ))
Temporary
Incident to employee transfers. (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters)

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Assigned to Government quarters
Partial allowance entitlement
Single quarters assigned
Cost/value consideration
A service member who is single, without dependents, was assigned to a Government-leased apartment. While the apartment did not qualify as family quarters because of size, it still substantially exceeded the single member housing standards of the Air Force. In line with the purpose for which a basic allowance for quarters at the partial rate (37 U.S.C. 1009) is payable and the reasoning in 56 Comp. Gen. 894, since the member's housing here is of a significantly higher value than would normally be assigned him, the member is not entitled to a basic allowance for quarters at the partial rate while so assigned. 56 Comp. Gen. 894, expanded 37
Dependents
Husband and wife both members of armed services
A member of the uniformed services who is separated from his or her spouse, who is also a member, and who has legal custody of one or more of their children on whose behalf the spouse contributes no support, is entitled to a basic allowance for quarters at the with-dependents rate, regardless of the spouse's entitlement, provided that the dependents on account of whom the increased allowance is paid do not reside in Government quarters 315
Dependent children from prior marriage
Parent not occupying Government quarters
Both of two uniformed service members, who are married to each other, and had dependent children in their own right prior to their marriage, may be paid an increased basic allowance for quarters on account of their respective dependents when the spouses do not reside together as a family unit because of their duty assignments. Whether the dependents reside with one, both, or neither of them would not affect their entitlement, provided that each member individually supports his or her dependent and is not assigned to Government family quarters. 60 Comp. Gen. 399 is modified 666

QUARTERS ALLOWANCE—Continued Page
Basic allowance for quarters (BAQ)—Continued
Dependents—Continued
Husband and wife both members of armed services—Continued
Dependent children from prior marriage—Continued
Parent not occupying Government quarters—Continued
When two uniformed service members who are married to each other, and who had dependent children in their own right prior to their marriage, are assigned to the same or adjacent bases, are not assigned Government quarters, and live together as a family unit, only one member may receive a quarters allowance at the increased "with-dependents" rate, and the other member may receive it at the "without-dependents" rate. Only one set of family quarters is required and all the dependent children belong to the same class of dependents upon which the increased allowance is based whether the children live with the members or not. To the extent that 60 Comp. Gen. 399 may be understood to contradict this holding, it is hereby modified 666
When a uniformed service member's child meets the qualifications for becoming the member's dependent following the member's marriage to another member who is not the child's natural parent and the members have other dependent children, the child joins the class of dependent children upon which the member-parent's increased basic allowance for quarters entitlement is determined. 60 Comp. Gen. 399 is modified 666
With dependent rate
Child support payments by divorced member
Both parents service members
Dual payment prohibition for common dependents
Where two married Air Force members with common dependents subsequently divorce, only one member may receive basic allowance for quarters based on the children as dependents, unless the class of common dependents is divided by separation agreement or court order. The member paying child support, which is stated to be on behalf of one child but is sufficient to qualify for entitlement under the applicable regulation, is entitled to the basic allowance for quarters at the with dependents rate while the member having custody of the children receives the allowance at the without dependents rate 350
Eligibility
Separation of husband and wife
Legal sufficiency of separation agreement
A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic allowance for quarters, even though the agreement was not issued or sanctioned by a court. However, a member's entitlement to basic allowance for quarters based on child support obligations created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody 315

QUARTERS ALLOWANCE—Continued Page
Dependents
Proof of dependency
Administrative *v.* GAO determination
Under 37 U.S.C. 403(h) the Secretary of the service concerned may make dependency and relationship determinations for enlisted members' quarters allowance entitlements and the determinations are final and may not be reviewed by the General Accounting Office. However, that provision does not apply to officers and the Comptroller General renders decisions in officers' cases and also in enlisted members' cases when requested by the service. In the interest of uniformity it seems appropriate to forward doubtful cases to the Comptroller General for decision particularly where an officer is married to an enlisted member 666
Occupancy of quarters
Government-furnished. (*See* QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ), Assigned to Government quarters)

RAILROADS
Railroad Retirement Board
Dual Benefits Payment Account
Borrowing funds from Railroad Retirement Account
Authority
Authority of Railroad Retirement Board to borrow from Railroad Retirement Account to make payments from Dual Benefits Payments Account is limited to the 30-day period before the beginning of the fiscal year 521
The authority of the Railroad Retirement Board to borrow funds from the Railroad Retirement Account to permit payment of the Dual Benefits Payments for the first month of a fiscal year does not depend upon the existence of an enacted appropriation or continuing resolution for the Dual Benefits Payments Account for the new fiscal year 521
Carry-over authority
Since the authorization for appropriation to the Dual Benefits Payments Account authorizes an annual appropriation, any amounts remaining in the account at the end of a fiscal year must be returned to the Treasury under 31 U.S.C. 1552(a)(2) unless the actual appropriation act provides carry-over authority 521
Investment authority
Under the Omnibus Reconciliation Act of 1981, interest may be earned on funds appropriated to the Dual Benefits Payments Account if invested by the Secretary of the Treasury and this interest credited to the Dual Benefit Payment Account. However, investment is precluded by the terms of the fiscal year 1983 appropriation to the Dual Benefits Payments Account 521

RATTLESNAKE NATIONAL RECREATION AREA AND WILDERNESS ACT
Exchange agreements
Bidding rights
As basis for State payments. (*See* PUBLIC LANDS, Acquisition, Exchange agreements, Bidding rights, As basis for State payments)

RATTLESNAKE NATIONAL RECREATION AREA AND WILDERNESS ACT—Continued Page
Exchange agreements—Continued
Bidding rights—Continued
Retirement by payment
Legality
Under proposed "Exchange Agreement" where Montana Power Company's total payment is in cash but it is accompanied by notice of use of bidding rights, Treasury would be required to pay Company for the amount of rights used pursuant to the notice. Reimbursement to Company is not proper absent authority to retire bidding rights by payment and lack of available appropriation for that purpose 102
Value limitation
Interest on unused rights
Legality
Proposed "Exchange Agreement" calls for increased bidding rights for Montana Power Company at 10 percent interest rate on outstanding unused bidding rights. Increase in value of bidding rights is not legally permissible since their value is limited to fair market value of lands under sec. 4(b)(2) of the Rattlesnake National Recreation Area and Wilderness Act, 16 U.S.C. 460*ll*-3(b)(2) (Supp. IV, 1980)..... 102

RECORDS
Correction
Military personnel. (*See* MILITARY PERSONNEL, Record correction)
Recordkeeping requirements
Fair Labor Standards Act
Claims accruing beyond 3 years
Denial propriety
Absence-of-records basis
Where an agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitations, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies..... 42
Retention
Extension of period
Claim settlement pending
Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from General Accounting Office. See 44 U.S.C. 3309 42

RECORDS—Continued Page
Retention—Continued
General Records Schedule 2
Time and attendance
Three-year period extension
Agency requests *v.* Schedule change
Federal Aviation Authority questions whether time and attendance (T&A) reports should be retained more than 3 years in order to adjudicate claims subject to 6-year statute of limitations. Without additional information, we would not recommend any change in the General Records Schedule 2 with regard to extending retention period for T&A reports from 3 to 6 years 42

REGULATIONS
Compliance
Failure to comply
Regulations for Government's benefit
Contract protests
Air Force regulation concerning the development of a statement of work and quality assurance plan for base-level services contracts implements Air Force policy and is for the benefit of the Government, not potential offerors. Therefore, the Air Force's alleged failure to comply with the regulation does not provide a basis for protest 219
Defense Acquisition Regulation. (*See* **DEFENSE ACQUISITION REGULATION**)
Travel
Federal
Real estate transactions
Time limitation for reimbursement
Effective date of amendment
Employee is not entitled to reimbursement for real estate expenses incurred in connection with his permanent change of station from New Cumberland, Pa., to Warren, Mich., on May 19, 1980, since settlement date did not occur within 2 years of date on which employee reported to new duty station as required by FTR para. 2-6.1e (May 1973). The amendment to FTR para. 2-6.1e, allowing 1 year extension of 2-year time limitation for completion of residence transactions, is effective only for employees whose entitlement period had not expired prior to Aug. 23, 1982. Since the employee's entitlement period expired prior to that date, the amendment is not applicable 264
Joint. (*See* **JOINT TRAVEL REGULATIONS**)

RELEASES
Proper release or acquittance
Survivor Benefit Plan annuitant
Mentally incapacitated adult
It is necessary that a good acquittance be obtained when payments are made to persons under Federal law. When amounts due a minor are involved, a good acquittance results through payment to the minor's natural guardian without formal court appointment, provided that the laws of the State of domicile authorize that procedure as a means of obtaining acquittance. However, payments may not be made to one claiming to act as natural guardian and custodian of a

RELEASES—Continued Page
Proper release or acquittance—Continued
Survivor Benefit Plan annuitant—Continued
Mentally incapacitated adult—Continued
payee, when the payee is in fact an adult suffering from mental illness. 44 Comp. Gen. 551 is modified in part 302

RELOCATION EXPENSES
Transfers
Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

SALES
Bids
Deposits
Agent's authority
Evidence timeliness. (*See* **AGENTS, Of private parties, Authority, Contracts, Time for submitting evidence**)
Insufficiency
Waiver
***De minimus* rule**
In solicitation for a contract of sale requiring a bid deposit of 20 percent of the bid, a deficiency of $100 on a deposit of $73,522 is *de minimus*, and properly may be waived 75
Personal checks
Sufficiency of funds verification
Right to Financial Privacy Act (1978)
When both Department of Defense manual covering disposal of property and solicitation for contract of sale specifically permit bid deposit to be in the form of a personal check, contracting officer may accept such a check and need not attempt to determine whether it is backed by sufficient funds 75

SET-OFF
Authority
Social Security benefits, etc. (*See* **SOCIAL SECURITY, Benefits**)
Contract payments
Assignments
"No set-off" provision
Absence effect
Under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, a lender is not protected against set-off by the presence of a no-set-off clause in the assigned contract unless the assignment was made to secure the assignee's loan to the assignor and only if the proceeds of the loan were used or were available for use by the assignor in performing the contract that was assigned. To the extent that our holdings in 49 Comp. Gen. 44 (1967), 36 Comp. Gen. 19 (1956), and other cases cited herein are not consistent with this decision they will no longer be followed. 60 Comp. Gen. 510 (1981) is clarified 683
Tax debts
Set-off precluded
When a contract containing a no-set-off clause is validly assigned under the Assignment of Claims Act, now codified at 31 U.S.C. 3727,

SET-OFF—Continued Page
Contract payments—Continued
Assignments—Continued
"No set-off" provision—Continued
Tax debts—Continued
Set-off precluded—Continued
to an eligible assignee who substantially complies with the statutory filing and notice requirements, the Internal Revenue Service cannot set off the contractor's tax debt against the contract proceeds due the assignee, even if the tax debt was fully mature prior to the date on which the contracting agency had received notice of the assignment. B-158451, Mar. 3, 1966, and B-195460, Oct. 18, 1979, are modified accordingly. 60 Comp. Gen. 510 (1981) is clarified 683
Recovery of overpayments
Procuring agency should attempt to recover payments that are in excess of the fair and reasonable value of services rendered under illegal contract provision. This can be done by setting off overpayments against any other amounts due the contractor, and may be done any time up to 10 years in appropriate circumstances 337

SEVERANCE PAY
Officers and employees. (*See* **COMPENSATION, Severance pay**)

SMALL BUSINESS ADMINISTRATION
Contracts
Contracting with other Government agencies
Procurement under 8(a) program
After withdrawal of small business set-aside
Prior to bid opening
Contracting officer reasonably determined that the public interest would best be served by canceling small business set-aside before bid opening in order to set aside the procurement for award to the Small Business Administration (SBA) under its 8(a) program for small, disadvantaged businesses (15 U.S.C. 637(a) (Supp. III, 1979)) where determination was: (1) an attempt to effectuate Government's socioeconomic interests; (2) necessary since contracting agency was unaware at time it issued small business set-aside that a viable 8(a) firm was capable of performing the work; and (3) concurred in by SBA 205
Fraud or bad faith alleged
Evidence sufficiency
In protest involving 8(a) procurement, fraud or bad faith is not shown by: (1) fact that contracting agency originally considered sole-source award to large business; (2) fact that contracting agency initially issued total small business set-aside, then canceled it before bid opening in order to make 8(a) award to Small Business Administration (SBA); (3) allegation that SBA violated its own Standard Operating Procedures, since they may be waived 205
Subcontracting under "8(a)" program. (*See* **SMALL BUSINESS ADMINISTRATION, Contracts, Contracting with other Government agencies, Procurement under 8(a) program**)
Purchases
Small
Procedures. (*See* **PURCHASES**)

Page

SMALL BUSINESS INNOVATION DEVELOPMENT ACT

Research and development

Small business set-asides

Appropriation availability. (*See* **APPROPRIATIONS, Availability, Contracts, Research and development, Small Business Innovation Development Act)**

SOCIAL SECURITY

Benefits

Overpayments

Debt collection

Social Security Administration is not bound by Federal Claims Collection Standards (FCCS) requiring administrative offset "in every instance in which this is feasible," in light of section 8(e) of the Debt Collection Act of 1982, 31 U.S.C. 3701(d). The FCCS, 4 CFR Chapter II, to the extent they implement the 1982 legislation, do not govern the use of administrative offset to collect debts arising under the Social Security Act. However, Social Security Administration may continue to use administrative offset to collect such debts when authorized by other statutes or principles of common law, and should look to FCCS for guidance to the extent it has not issued its own offset regulations 599

Military personnel

Retired

Survivor Benefit Plan

Offset

Formula

Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment 471

STATE DEPARTMENT

Employees

Home to work transportation

Government vehicles

GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to the heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so 438

STATE DEPARTMENT—Continued Page
Employees—Continued
Home to work transportation—Continued
Government vehicles—Continued
The State Department's reliance on the GAO decision in 54 Comp. Gen. 855 (1975) to support the proposition that the use of Government vehicles for home-to-work transportation of Government officials and employees lies solely within the administrative discretion of the head of the agency was based on some overly broad dicta in that and several previous decisions. Read in context, GAO decisions, including the one cited by the State Department's Legal Advisor, only authorize the exercise of administrative discretion to provide home-to-work transportation for Government officials and employees on a temporary basis when (1) there is a clear and present danger to Government employees or an emergency threatens the performance of vital Government functions, or (2) such transportation is incident to otherwise authorized use of the vehicles involved 438

STATES
Federal aid, grants, etc.
Interest on Federal funds
Accountability
Where subgrantee of CETA grant to State of Arkansas earned interest on recovered FICA taxes before the recovery was returned to the Federal Government, the interest is an applicable credit under the grant agreement and grant cost principles. As a result, all interest earned by subgrantee on the recovery is owed to the grantee and by the grantee to the Department of Labor to the extent not offset by allowable grant costs 701
Where a subgrantee of State CETA grantee recovers grant funds and earns interest on recoveries, the interest is not held on advance basis and is not exempt from accountability under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a) 701

STATUTES OF LIMITATION
Accountable officers
Irregularities in accounts
An agency must report financial irregularities to GAO within 2 years from the time that the agency is in receipt of substantially complete accounts. This requirement is to allow the Government the opportunity to raise a charge against the account within the 3-year statute of limitations period 476
Although a certifying officer at National Institutes of Health (NIH) made a computational error in certifying a voucher for payment, thus proximately causing an overpayment of $11,184, his accounts are settled by operation of law and he cannot be held liable for the loss where the Government did not raise a charge against the account within 3 years of receipt by the NIH of the substantially complete accounts of the certifying officer 498
Claims
Claims settlement by GAO
Retention of agency records
Federal Aviation Authority questions whether time and attendance (T&A) reports should be retained more than 3 years in order to

STATUTES OF LIMITATION—Continued Page
Claims—Continued
Claims settlement by GAO—Continued
Retention of agency records—Continued
adjudicate claims subject to 6-year statute of limitations. Without additional information, we would not recommend any change in the General Records Schedule 2 with regard to extending retention period for T&A reports from 3 to 6 years 42
Date of accrual
Compensation payments
Backpay
Two employees were awarded backpay pursuant to a Dec. 10, 1973 ruling by the Board of Appeals and Review of the Civil Service Commission that they had involuntarily resigned from their positions in 1972. The employees' claims that overtime earnings were improperly deducted from their backpay awards were received in this Office on June 16 and July 14, 1980. The claims may not be allowed since they accrued on Dec. 10, 1973, the date of the Board's determination, and 31 U.S.C. 71a (1976) (now sec. 3702) bars consideration of claims received in this Office more than 6 years after the date the claim first accrues. 61 Comp. Gen. 57 is amplified 275
Retired pay
Non-Regular service
Garcia case
A service member filed an application for non-Regular retired pay under 10 U.S.C. 1331 almost 6 years after meeting the age requirement, but retired pay was not granted because records did not show he had sufficient years of service. Upon his submission of additional proof, it was determined that he had sufficient service. Although more than 6 years elapsed between his meeting the age requirement and the determination that he was eligible for retired pay, none of his retroactive retired pay is barred by 31 U.S.C. 71a (now sec. 3702(b)), in view of *Garcia* v. *United States,* 617 F. 2d 218 (Ct. Cl. 1980), since such claims will now be deemed to accrue only after the service's determination that the claimant has the required service 227
Filing in other than GAO
Does not meet requirements of 10/9/40 act, as amended
Employee of Forest Service claims per diem in connection with transfer to seasonal worksite every 6 months for period from May 7, 1973, through Nov. 19, 1976. Claim was subject of grievance proceeding in agency and was not received in General Accounting Office (GAO) until Jan. 18, 1982. Portion of claim arising before Jan. 18, 1976, may not be considered since Act of Oct. 9, 1940, as amended, 31 U.S.C. 71a, bars claims presented to GAO more than 6 years after date claim accrued. Filing with administrative office concerned does not meet requirement of Barring Act 80

STATUTORY CONSTRUCTION
General and specific statutes
Precedence
Forest Service, Department of Agriculture, is not required to request clearance from Federal Prison Industries Incorporated (FPI) when making purchases from private sources using funds appropri-

STATUTORY CONSTRUCTION—Continued Page
General and specific statutes—Continued
Precedence—Continued
ated by Public Law 98-8. 18 U.S.C. 4124 generally requires Federal agencies to buy all FPI products which meet their requirements from FPI rather than from private sources. Public Law 98-8 (98th Cong., 1st sess., 97 Stat. 13 (March 24, 1983)) is an emergency measure which appropriates funds for projects designed to combat the economic recession occurring at the time of its passage. Specific legislation prevails over general. Since private purchases further the Act's purposes the requirement to purchase from FPI does not apply..... 617
Legislative history, title, etc.
Public Law 97-377
Federal judges comparability pay increases
Question presented is entitlement of Federal judges to 4 percent comparability increase under sec. 129 of Pub. L. 97-377, Dec. 21, 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of sec. 129(b) of Pub. L. 97-377, combined with specific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges.... 358
Legislative intent
Appropriation restrictions
Interpretation of enforcing agency
Absence of congressional objection
Specialty metals' procurements
Agency interpretation of Department of Defense Appropriation Act restriction against the purchase of articles consisting of foreign specialty metals as reflected in DAR 6-302 is to be accorded deference. General Accounting Office will not object to DAR 6-302 provision that statutory restriction is met if the specialty metal is melted in the United States, notwithstanding protester's contention that statute requires that such articles be manufactured entirely in the United States. DAR provision is based on wording in legislative history and has been in existence for 10 years without congressional objection. 49 Comp. Gen. 606 is distinguished 256
Presumptions against superfluity
Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in Oct. 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since sec. 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on Oct. 1, 1982, in the absence of specific congressional authorization 54
Prospective effect of acts
Section 145 of Pub. L. 97-377, Dec. 21, 1982, which amends 5 U.S.C. 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to Aug. 3, 1981, as were the original provisions of 5 U.S.C. 5546a(a) added by subsec. 151(a) of Pub. L. 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express lan-

STATUTORY CONSTRUCTION—Continued Page

Prospective effect of acts—Continued

guage nor the legislative history supports the view that the amendment made by sec. 145 is retroactively effective 396

STOCKPILING

Strategic and critical materials

Barter exchange. (*See* **STRATEGIC AND CRITICAL MATERIALS, Barter exchange**)

STRATEGIC AND CRITICAL MATERIALS

Barter exchange

Excess Stockpile materials

Authority of GSA

Sales as contractor's agent

Congressional oversight

Proposal by General Services Administration (GSA) to sell, on behalf of contractor, excess Stockpile materials under the Strategic and Critical Stock Piling Act, 50 U.S.C. 98e(c), where title has been transferred to the contractors in exchange for other needed Stockpile materials, is legally within the parameters of GSA's existing barter authority. Where a statute confers duties in general terms, all powers and duties incidental and necessary to make such authority effective are included by implication. Congress has encouraged barter transactions and the proposed plan helps accomplish the purposes of the Act. However, since it may have a significant effect on congressional control over the Stockpile transaction, GSA should discuss the proposal with its congressional oversight and appropriations committees before implementation 245

National Defense Stockpile Fund

Crediting non-necessity

Government sales in agent capacity

Where United States is acting as agent in sale of excess Stockpile materials on behalf of contractors to whom title of materials has been transferred, GSA may pay proceeds from the sale directly to the contractor rather than deposit it to the credit of the National Defense Stockpile Fund, 50 U.S.C. 98h, since the proceeds are for the benefit of the contractor rather than the United States 245

SUBSISTENCE

Actual expenses

Maximum rate

Reduction

Meals, etc. cost limitation

Lodging costs incurred

Volume 2 of Joint Travel Regs. does not specify across-the-board dollar limitation for purpose of determining reasonableness of actual subsistence claims for meals and miscellaneous expenses. In this case, accounting and finance officer considered a meal expense to be excessive and applied a dollar limitation to reimbursement. Absent sufficient justification for the higher dinner cost, that action is upheld. It is noted that provisions of 2 JTR para. C4611 limit meal and miscellaneous expenses reimbursement to 50 percent of high cost area rate in specific situations where lodging costs are not incurred.

SUBSISTENCE—Continued Page
Actual expenses—Continued
Maximum rate—Continued
Reduction—Continued
Meals, etc. cost limitation—Continued
Lodging costs incurred—Continued
A similar limitation for application to subsistence expenses claims involving commercial lodging costs could be applied 88
Meals
Dinner
At airport prior to return from TDY
Reimbursement guidelines
An employee on temporary duty obtained a meal at the airport prior to his return flight. Although a traveler is ordinarily expected to eat dinner at his residence on evening of return from temporary duty, the determination of whether an employee should be reimbursed is for the agency. In determining whether it would be unreasonable to expect an employee to eat at home rather than en route, factors such as elapsed time between meals and absence of in-flight meal service may be considered. B-189622, Mar. 24, 1978, is distinguished 168
Per diem
Actual expenses. (*See* **SUBSISTENCE, Actual expenses**)
Fractional days
Thirty-minute period at beginning or end
The 30-minute rule applicable to the payment of per diem under para. 1-7.6e, FTR, when the time of departure or arrival is within 30 minutes before or after the beginning of a quarter, respectively, is not intended to be applicable to continuous travel of 24 hours or less. 40 Comp. Gen. 400 (1961) 269
Headquarters
Permanent or temporary
Criteria
The assignment of a Customs Service employee to a new duty station for 2 years under a rotational staffing program is held to be a permanent change of station rather than a temporary duty assignment. We have held that the duration of an assignment and the nature of the assigned duties are the vital elements in the determination of whether an assignment is temporary duty or permanent change of station. Although the assignment here is for a definite time period and further reassignment of the employee is contemplated, the duration of the assignment is far in excess of that normally contemplated as temporary. Moreover, the duties assigned are not those usually associated with temporary duty 560
Seasonal worksites
Transfer orders not issued
Employee of Forest Service grieved entitlement to per diem in connection with assignment to seasonal worksite every 6 months. We agree with the Grievance Examiner's factual determination that the employee was in a temporary duty status and therefore entitled to per diem as provided for in the Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employees maintained

SUBSISTENCE—Continued Page
Per diem—Continued
Headquarters—Continued
Permanent or temporary—Continued
Seasonal worksites—Continued
Transfer orders not issued—Continued
their permanent homes at their official duty station while living in Government quarters at the seasonal worksite 80
Illness, etc.
Medical examination
An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294
"Lodgings-plus" basis
Computation
Average cost of lodgings
Annual leave effect
An employee rented a house for a month while on temporary duty, rather than obtaining lodgings on a daily basis. He went on annual leave for 1 day during the period but continued to occupy the rented lodgings that night. The employee's average cost of lodging for the purpose of per diem computation on a lodgings-plus basis is to be determined by prorating the total rental cost over the 30 days of temporary duty, excluding the day of annual leave, if the agency determines the employee acted prudently in obtaining the lodgings for a month and the cost to the Government does not exceed the cost of suitable lodging at a daily rate 63
Military personnel
Personal convenience
Alternate port of debarkation
Notwithstanding a Marine Corps regulation authorizing a mileage allowance and per diem from an alternate aerial port of debarkation to a new permanent duty station incident to a transfer from outside the United States to the United States, for the purpose of recovering a relocated privately owned vehicle, the member's entitlement is limited to allowances based on travel from the appropriate aerial port of debarkation serving the new station to the new station, in the absence of an amendment to the Joint Travel Regulations 651
Temporary duty
Appropriation limitations
Exceptions
The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object

SUBSISTENCE—Continued Page

Per diem—Continued

Military personnel—Continued

Temporary duty—Continued

Appropriation limitations—Continued

Exceptions—Continued

to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended 308

Rates

Lodging costs

Leased television with option to purchase

Absent evidence that the claimant terminated a television lease agreement with option to purchase at end of temporary duty assignment he may not include cost of renting the television in the computation of the lodgings portion of his per diem allowance. Payments on personal property for the purpose of eventual ownership are not within the purview of lodging costs recognized as reimbursable 635

Temporary duty

Headquarters determination. (*See* **SUBSISTENCE, Per diem, Headquarters, Permanent or temporary**)

Lodging in rental property owned

An employee who uses his mobile home for lodging while on temporary duty may not include $600 rental payment allegedly made to himself in computing the lodgings portion of his per diem allowance even though he claims that the mobile home is held for rental purposes. If the employee submits documentation to establish that the property is held and used as a rental unit and would otherwise have been rented out during period of his claim, allocable interest and taxes incurred, if any, may be included in determining lodging costs .. 635

Transferred employees

Delays

Employee who performed travel incident to transfer of duty station was delayed by breakdown of mobile home in which he and his family were traveling. On basis of such delay, he claimed temporary quarters expenses for a 6-day period during which the mobile home was being repaired. Temporary quarters expenses may not be paid since, for the period of actual travel en route to the new station, the employee's rights are limited by 5 U.S.C. 5724a to an appropriate per diem allowance rather then temporary quarters expenses 629

Employee's entitlement to travel expenses en route to new station is generally limited to per diem for number of days authorized for travel. However, when employee is delayed en route for reasons acceptable to agency, per diem may be allowed for period of delay. Since employee here was delayed by breakdown of his mobile home residence, he would have had to occupy temporary quarters, pending completion of repairs, even if he had proceeded directly to his new station. Under these circumstances, employee's per diem expenses may be allowed 629

Temporary quarters. (*See* **OFFICERS AND EMPLOYEES, Transfers, Temporary quarters**)

Page

SURVIVOR BENEFIT PLAN (*See* **PAY, Retired, Survivor Benefit Plan**)

TAXES

Federal

Interest and penalties

Interest earned by subgrantee of Federal grant

Where subgrantee of CETA grant to State of Arkansas earned interest on recovered FICA taxes before the recovery was returned to the Federal Government, the interest is an applicable credit under the grant agreement and grant cost principles. As a result, all interest earned by subgrantee on the recovery is owed to the grantee and by the grantee to the Department of Labor to the extent not offset by allowable grant costs 701

TRAILER ALLOWANCES

Military personnel. (*See* **TRANSPORTATION, Household effects, Military personnel, Trailer shipment**)

TRANSPORTATION

Air carriers

Foreign

American carrier availability. *(See* **TRAVEL EXPENSES, Air travel, Fly America Act**)

Claims

Settlement

Contract Disputes Act effect. *(See* **CONTRACTS, Contract Disputes Act of 1978, Inapplicability, Matters covered by other statutes, Transportation Act**)

Household effects

Actual expenses

Allowance basis

Cost comparison

Timeliness of comparison

Employee who made his own arrangements and shipped his own household goods on Oct. 1, 1981, should not have his entitlement limited to the low-cost available carrier on the basis of a GSA rate comparison made 2 months after-the-fact. GSA regulations require that cost comparisons be made as far in advance of the moving date as possible, and that employees be counseled as to their responsibilities for excess cost if they choose to move their own household goods. However, cost of insurance must be recouped 375

Weight certificate invalid

Constructive weight substitution

Transferred employee was assessed weight charges for 4,300 pounds over statutory maximum household goods shipment of 11,000 pounds. Mover admitted that weight certificates were invalid because 200 pounds unrelated to employee's move were included in weight due to unintended error and for which mover made refund to Government. The invalidation of the weight certificates does not claim excess weight costs in the move; rather, a constructive shipment weight should be obtained under para. 2-8.2b(4) of the Federal Travel Regulations 19

TRANSPORTATION—Continued Page

Household effects—Continued

Commutation

Actual expenses *v.* commuted rate

Administrative determination

Employee of Dept. of Energy made his own arrangements and shipped his household goods on Oct. 1, 1981, under travel orders which stated that the "method of reimbursing household goods costs to be determined." Agency obtained a cost comparison from General Services Administration (GSA) after-the-fact in Dec. 1981, and reimbursed employee for his actual expenses rather than the higher commuted rate. Under GSA regulation effective Dec. 30, 1980, agency's action was proper since its determination was consistent with the purpose of the new regulation; to limit reimbursement to cost that would have been incurred by the Government if the shipment had been made in one lot from one origin to one destination by the available low-cost carrier on a Government Bill of Lading. Decisions of this Office allowing commuted rate prior to effective date of GSA regulation will no longer be followed 375

House trailer shipments, etc.

Purchase costs

Employee may be reimbursed, in connection with the purchase of a sailboat to be occupied as a residence upon transfer of station, those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the operation of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2-3.1b 289

Reimbursement

Ownership at time of transportation requirement

Although it is held that a boat may qualify as a mobile dwelling under 5 U.S.C. 5724(b), an employee who purchased a sailboat to be occupied as his residence incident to permanent change of station is not entitled to freight charges in transporting the boat from the place of construction to the delivery site where it was launched since the employee was not the owner of the boat at the time it was transported 289

Military personnel

Trailer shipment

Residence use requirement

Transferred member of the Air Force may be reimbursed the cost of transporting the houseboat he uses as his dwelling under 37 U.S.C. 409, which permits the transportation at Government expense of a mobile home dwelling, because it is determined that a boat may qualify as a "mobile home dwelling" under the law. 48 Comp. Gen. 147 is overruled and regulations issued to implement that decision need not be applied so as to exclude payment for transporting boats which are used as residences 292

Overseas employees

Return to United States

Separation

Criteria for expense reimbursement

In order for employee to be reimbursed expenses incident to return travel to former place of residence, travel must be clearly incidental

TRANSPORTATION—Continued Page
Household effects—Continued
Overseas employees—Continued
Return to United States—Continued
Separation—Continued
Criteria for expense reimbursement—Continued
to separation and should commence within reasonable time thereafter. Employee who resigned position effective Oct. 2, 1981, notified agency on Mar. 2, 1982, of intent to return to former place of residence commencing on Sept. 23, 1983, and who accepted employment at location of resigned position does not meet requirements for reimbursement 200
Weight limitation
Excess cost liability
Constructive weight basis
Computation formula
To correct error resulting from invalidation of weight certificates, the constructive weight of the household goods shipment should be computed and substituted for the incorrect actual weight. Where the constructive weight under para. 2-8.2b(4) is unobtainable, the weight of the shipment must be determined by other reasonable means. Here, mover's evidence supporting revised constructive weight determination is unrebutted by employee, is the only evidence of record on the correct weight of the shipment, and is not unreasonable. Excess weight charges should be computed on the revised constructive weight 19
Constructive weight substitution
Weight certificate invalid
Transferred employee was assessed weight charges for 4,300 pounds over statutory maximum household goods shipment of 11,000 pounds. Mover admitted that weight certificates were invalid because 200 pounds unrelated to employee's move were included in weight due to unintended error and for which mover made refund to Government. The invalidation of the weight certificates does not claim excess weight costs in the move; rather, a constructive shipment weight should be obtained under para. 2-8.2b(4) of the Federal Travel Regulations 19
What constitutes
Bicycle/utility trailers
Employee who was transferred to a new duty station claims reimbursement for the cost of transporting a bicycle trailer to his new residence and for temporary storage of the trailer prior to shipment. The costs of transporting and storing a bicycle trailer are reimbursable by the Government since such a trailer may properly be categorized as "household goods," as defined in para. 2-1.4h of the Federal Travel Regulations (FTR). Moreover, the FTR does not specifically prohibit the shipment of a bicycle trailer as household goods 45
Military personnel
Release from active duty
Rights
The Joint Travel Regulations, Vol. 1, may be amended to include travel and transportation allowances to a home of selection for a member discharged or released from active duty with separation pay under 10 U.S.C. 1174 (Supp. IV, 1980). A statute must be read in the

TRANSPORTATION—Continued Page

Military personnel—Continued

Release from active duty—Continued

Rights—Continued

context of other laws pertaining to the same subject and should be interpreted in light of the aims and designs of the total body of law of which it is a part 174

Mobile homes

Civilian personnel. *(See* **TRANSPORTATION, Household effects, House trailer shipments, etc.)**

Military personnel. *(See* **TRANSPORTATION, Household effects, Military personnel, Trailer shipment)**

Rates

Classification

Inapplicable

"Freight, all kinds"

Class rate in quotation

Where formula for determining freight all kinds (FAK) rate offered in carrier's tender provides for taking percentage of applicable class 100 rate from appropriate tariff, there is no intention to further refer to the National Motor Freight Classification to determine each article's individual class rating because the formula clearly implies a class 100 basis and to do so would defeat the obvious purpose of the tender to offer Government FAK rates which are in the nature of commodity rates and designed to bypass the classification rating process 29

Section 22 quotations

Construction

NMFC rule applicability

Weight consideration in shipping same commodity

Generally, for the same commodity, a carrier may not charge a shipper a greater amount to transport a lesser weight 29

TRAVEL EXPENSES

Air travel

Constructive cost reimbursement

Military Airlift Command service

Employee of the Navy en route from temporary duty overseas selected a particular schedule for the purpose of taking leave along a usually traveled route. He used a foreign air carrier for one leg of his travel even though he could have used Military Airlift Command (MAC) chartered air service for travel from his place of origin to the United States. Since MAC full plane charter services need not be considered as available U.S. air carrier under the Fly America Act his use of a foreign air carrier may be justified in the usual manner using only available commercial flights. However, under his travel order and applicable regulation reimbursement for return travel is limited to the constructive MAC cost 512

Rail travel

Medical condition

Where employee, who traveled by privately owned vehicle as a matter of preference and took additional time away from his official duties, is to be reimbursed at the constructive cost of rail transporta-

TRAVEL EXPENSES—Continued Page
Air travel—Continued
Constructive cost reimbursement—Continued
Rail travel—Continued
Medical condition—Continued
tion, the employee's annual leave may be charged for the work hours involved in the trip exceeding those hours which would have been required had he used rail transportation 395
Fly America Act
Employees' liability
Travel by noncertificated air carriers
Under guidelines issued by the Comptroller General, reasons for use of foreign air carrier must be properly certified. Comptroller General decisions contain guidelines regarding the adequacy of reasons for utilizing a foreign carrier. The Joint Travel Regulations require a determination of unavailability by the transportation or other appropriate officer and the requirements contained therein are in keeping with the Comptroller General's guidelines and reimbursement is not authorized absent compliance 278
Involuntary re-routing
En route home from temporary duty overseas an employee indirectly routed his travel to take annual leave in Dublin and scheduled his return flight from Shannon to the United States on a U.S. air carrier. Upon arrival in Shannon the employee was informed that his scheduled flight had been discontinued and the carrier scheduled the employee's transoceanic travel on a foreign air carrier. Since there were no alternative schedules at that point under which the employee could have traveled on U.S. air carriers available under the Comptroller General's "Guidelines for Implementation of the Fly America Act" for the transoceanic portion of his travel, there need be no penalty for the use of a foreign air carrier 496
Meals
At airport
Reimbursement
An employee on temporary duty obtained a meal at the airport prior to his return flight. Although a traveler is ordinarily expected to eat dinner at his residence on evening of return from temporary duty, the determination of whether an employee should be reimbursed is for the agency. In determining whether it would be unreasonable to expect an employee to eat at home rather than en route, factors such as elapsed time between meals and absence of in-flight meal service may be considered. B–189622, Mar. 24, 1978, is distinguished 168
Constructive travel costs
Computation
Because of medical condition affecting employee's eardrums, he was unable to travel by air to a temporary duty station. Instead of traveling by train, he chose to travel by privately owned vehicle, with reimbursement limited to constructive cost of travel by common carrier. Since travel by air was not available to employee, the "appropriate" common carrier transportation under FTR para. 1–4.3 was rail transportation, and the constructive cost of rail rather than air transportation is thus applicable 393

TRAVEL EXPENSES—Continued Page

Conventions, conferences, etc.

Attendees

State officials

Use of appropriated funds by National Highway Traffic Safety Administration (NHTSA) to pay travel and lodging expenses of State officials to attend a proposed training workshop on odometer fraud is prohibited by 31 U.S.C. 1345 (formerly 551), as the proposed expenditures are not specifically provided for by the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1981 *et seq.* (1976), or other statute. Also, as this proposal is to be carried out by contract, the exception in our cases for grants does not apply. 35 Comp. Gen. 129 is distinguished 531

Illness. (*See* **SUBSISTENCE, Per diem, Illness, etc.**)

Medical treatment. (*See* **MEDICAL TREATMENT, Officers and employees, Travel expenses**)

Mileage. (*See* **MILEAGE**)

Military personnel

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

Temporary duty

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel, Temporary duty**)

Transfers

Reimbursement basis

Notwithstanding a Marine Corps regulation authorizing a mileage allowance and per diem from an alternate aerial port of debarkation to a new permanent duty station incident to a transfer from outside the United States to the United States, for the purpose of recovering a relocated privately owned vehicle, the member's entitlement is limited to allowances based on travel from the appropriate aerial port of debarkation serving the new station to the new station, in the absence of an amendment to the Joint Travel Regulations 651

Official business

Medical treatment

An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294

Overseas employees

Renewal agreement travel

Employee recruited from her place of actual residence in the continental United States for assignment in Puerto Rico and who meets all of the eligibility requirements under 5 U.S.C. 5728(a) is entitled to tour renewal agreement travel. An agency cannot defeat an employ-

TRAVEL EXPENSES—Continued Page
Overseas employees—Continued
Renewal agreement travel—Continued
ee's travel entitlement under section 5728(a) by refusing to negotiate a renewal agreement where the particular position could have been filled locally because payment of renewal agreement travel expenses to an employee who meets all of the eligibility requirements is mandatory rather than discretionary with the employing agency 545
Agency policy, which purports to deny 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements 545
Constructive travel costs
Computation
Special air fares should be used to compute constructive travel expenses to an employee's residence as the maximum entitlement to tour renewal travel to an alternate location, provided the agency can determine before the travel begins that the discount fare would be practical and economical. Applicability of special fares should be determined on the basis of constructive travel to the actual place of residence, using the scheduled dates of departure and return, even though the travel is to an alternate location 596
Return for other than leave
Separation
Time limitation on travel
Private employment at termination location effect
In order for employee to be reimbursed expenses incident to return travel to former place of residence, travel must be clearly incidental to separation and should commence within reasonable time thereafter. Employee who resigned position effective Oct. 2, 1981, notified agency on Mar. 2, 1982, of intent to return to former place of residence commencing on Sept. 23, 1983, and who accepted employment at location of resigned position does not meet requirements for reimbursement 200
Per diem. (*See* **SUBSISTENCE, Per diem**)
Prudent person rule
An employee on temporary duty obtained a meal at the airport prior to his return flight. Although a traveler is ordinarily expected to eat dinner at his residence on evening of return from temporary duty, the determination of whether an employee should be reimbursed is for the agency. In determining whether it would be unreasonable to expect an employee to eat at home rather than en route, factors such as elapsed time between meals and absence of in-flight meal service may be considered. B-189622, Mar. 24, 1978, is distinguished 168
Vehicles
Use of privately owned
Between residence and terminal
Mileage reimbursement claim. (*See* **MILEAGE, Travel by privately owned automobile, Between residence and terminal**)

TRAVEL EXPENSES—Continued Page
Vehicles—Continued
Use of privately owned—Continued
Mileage reimbursement claim. (*See* **MILEAGE, Travel by privately owned automobile**)

TREASURY DEPARTMENT
Secretary of Treasury
Authority
Investment
Dual Benefits Payment Account
Under the Omnibus Reconciliation Act of 1981, interest may be earned on funds appropriated to the Dual Benefits Payment Account if invested by the Secretary of the Treasury and this interest credited to the Dual Benefits Payment Account. However, investment is precluded by the terms of the fiscal year 1983 appropriation to the Dual Benefits Payment Account 521
Treasurer of United States
Relief
Duplicate check losses
Appropriation adjustment
Statutory authority status
Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general, General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527 (c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted 91

VEHICLES
Government
Home to work transportation
Government employees
Misuse of vehicles
Liability of employees
Because so many agencies have relied on apparent acquiescence by the Congress during the appropriations process when funds for passenger vehicles were appropriated without imposing any limits on an agency's discretion to determine the scope of "official business," and because dicta in GAO's own decisions may have contributed to the impression that use of cars for home-to-work transportation was a matter of agency discretion, GAO does not think it appropriate to seek recovery for past misuse of vehicles (except for those few agencies whose use of vehicles was restricted by specific Congressional enactments). This decision is intended to apply prospectively only. Moreover, GAO will not question such continued use of vehicles to transport heads of non-cabinet agencies and the respective seconds-in-command of both cabinet and non-cabinet agencies until the close of this Congress 438

VEHICLES—Continued Page
Government—Continued
Home to work transportation—Continued
Government employees—Continued
Prohibition
GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to the heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so 438
Exemptions
GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments 438
GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. 1344(b)(3), to include those high ranking officials whose duties require frequent official contact on a diplomatic level with high ranking officials of foreign governments. GAO construes 31 U.S.C. 1344(b)(3) to only include those persons who have been properly appointed, or have properly succeeded, to head a foreign diplomatic, consular, or other Foreign Service post, as an ambassador, minister, charge d'affaires, or other similar principal diplomatic or consular official 438
Official use determination
Administration discretion
The State Department's reliance on the GAO decision in 54 Comp. Gen. 855 (1975) to support the proposition that the use of Government vehicles for home-to-work transportation of Government officials and employees lies solely within the administrative discretion of the head of the agency was based on some overly broad dicta in that and several previous decisions. Read in context, GAO decisions, including the one cited by the State Department's Legal Advisor, only authorize the exercise of administrative discretion to provide home-to-work transportation for Government officials and employees on a temporary basis when (1) there is a clear and present danger to Government employees or an emergency threatens the performance of vital Government functions, or (2) such transportation is incident to otherwise authorized use of the vehicles involved 438

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VESSELS
Charters
Long-term
Obligational availability
Navy Industrial Fund
Anti-Deficiency Act compliance
The Antideficiency Act, 31 U.S.C. 1431, would not prevent the Navy from entering into the TAKX long-term ship leasing program, to be financed through the Navy Industrial Fund, so long as the unobligated balance of the Fund is sufficient to cover the Government's obligation until commencement of the lease period. Navy may not, through acceptance of vessel delivery, agree to commencement of the lease arrangement if the obligational availability of the Fund is at that time insufficient to cover any consequential increase in the Government's obligation 143
Termination expenses
Under the Navy's TAKX ship leasing program, ship charters will cover a base period of 5 years, renewable up to 20 years at 5-year intervals, and with substantial termination costs for failure to renew. Such contracts, once in effect, should be recorded as firm obligations of the Navy Industrial Fund at an amount sufficient to cover lease costs for the 5-year base period, plus any termination expenses for failure to renew 143

VOLUNTARY SERVICES
Meals, etc.
Appropriation availability
Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or *quantum meruit,* applied as if contractor had not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines will be followed in future. Applying this approach, National Guard officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen. 595 419
Personal funds in interest of Government. (*See* PAYMENTS, Voluntary)

WORDS AND PHRASES
"Adversary adjudication"
Equal Access to Justice Act
Recovery under the Equal Access to Justice Act of attorney's fees and costs incurred in pursuing a bid protest at General Accounting Office (GAO) is not allowed because GAO is not subject to the Administrative Procedures Act (APA) and in order to recover under Equal Access to Justice Act claimant must have prevailed in an adversary adjudication under the APA 86

WORDS AND PHRASES—Continued Page

"Appropriate remedies"

Civil Rights Act, as amended

Title VII

The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision 239

Basic pay "received"

Erroneous payments of basic pay should not be included in the computation of a service member's retired pay base for purposes of computing his retired pay entitlement under 10 U.S.C. 1407. Although that statute provides that retired pay base will be computed on basic pay "received" over a period of months of active duty, that is construed to mean only basic pay the member was legally entitled to receive 157

Bidding rights

Rattlesnake National Recreation Area and Wilderness Act

Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt 102

Compensatory time off for religious observances

Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. 5550a, despite fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for Federal employees to earn and use compensatory time for religious purposes, Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute 589

"Dependent child"

Survivor Benefit Plan

Under the Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suf-

WORDS AND PHRASES—Continued Page

"Dependent child"—Continued

Survivor Benefit Plan—Continued

fered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 44 Comp. Gen. 551 is modified in part 302

"Equivalent increase"

Civil Service Reform Act of 1978

Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay* retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information submitted, by 63 Comp. Gen. ——— (B-209414, Dec. 7, 1983) ... 151

"Extramural budgets"

What constitutes

Small Business Innovation Development Act

In calculating its 1983 set-aside for small business innovation research program, National Aeronautics and Space Administration should apply definition of "research and development" that appears in Small Business Innovation Development Act, Pub. L. 97-219, 96 Stat. 217, July 22, 1982, to its budget for Fiscal Year 1983 without regard to appropriation heading "Research and Development." Since Congress clearly appropriated funds for certain operational activities under that heading, it would be contrary to congressional intent for set-aside to be based on amounts not available for research and development 232

"Fitness for duty" medical examination

An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294

"Heads of executive departments"

GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments 438

WORDS AND PHRASES—Continued Page

Home to work transportation

GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to the heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so 438

"Hours of work"

Under FLSA, overtime is computed on basis of hours in excess of 40-hour workweek, as opposed to 8-hour workday. Additionally, paid absences are not considered "hours worked" in determining whether employee has worked more than 40 hours in a workweek 187

"Household effects"

Employee who was transferred to a new duty station claims reimbursement for the cost of transporting a bicycle trailer to his new residence and for temporary storage of the trailer prior to shipment. The costs of transporting and storing a bicycle trailer are reimbursable by the Government since such a trailer may properly be categorized as "household goods," as defined in para. 2-1.4h of the Federal Travel Regulations (FTR). Moreover, the FTR does not specifically prohibit the shipment of a bicycle trailer as household goods 45

"Money"

Mineral Lands Leasing Act

Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt 102

"Prequalification statement"

Indian housing procurements

Preference to Indian firms

Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise 138

"Principal diplomatic and consular officials"

GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. 1344(b)(3), to include those high ranking officials whose duties require frequent official contact on a diplomatic level with high ranking officials of foreign governments. GAO construes 31 U.S.C.

WORDS AND PHRASES—Continued Page
"Principal diplomatic and consular officials"—Continued
1344(b)(3) to only include those persons who have been properly appointed, or have properly succeeded, to head a foreign diplomatic, consular, or other Foreign Service post, as an ambassador, minister, charge d'affaires, or other similar principal diplomatic or consular official 438
"Public utility services"
Contract between General Services Administration (GSA) and a non-tariffed supplier for procurement of telephone equipment and related installation and maintenance services is one for "public utility services" within the scope of 40 U.S.C. 481(a)(3) (authorizing GSA to make contracts for public utility services for periods up to 10 years), since it is the nature of the services provided and not the nature of the provider of the services that is determinative for the purpose of the law. Sale of telephone equipment is a utility type service. Installment purchase contracts as well as leases or leases with options to purchase are within the scope of 40 U.S.C. 481(a)(3) 569
"Request"
Progress payments
Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases modified in part 113
"Research and development"
What constitutes
Small Business Innovation Development Act
In calculating its 1983 set-aside for small business innovation research program, National Aeronautics and Space Administration should apply definition of "research and development" that appears in Small Business Innovation Development Act, Pub. L. 97-219, 96 Stat. 217, July 22, 1982, to its budget for Fiscal Year 1983 without regard to appropriation heading "Research and Development." Since Congress clearly appropriated funds for certain operational activities under that heading, it would be contrary to congressional intent for set-aside to be based on amounts not available for research and development 232
Slash (/) virgule
Bid stating that country of manufacture is "USA/England" was correctly evaluated as offering foreign end product for purposes of applying Buy American Act because the bid can reasonably be construed to permit the bidder to furnish either a domestic or a foreign product in the event of award 154
"Total financial package"
Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement of $163 premium paid for title insurance on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement of the fee paid for title insurance under "total fi-

WORDS AND PHRASES—Continued Page

"Total financial package"—Continued

nancial package" concept enunciated in *Arthur J. Kerns*, 60 Comp. Gen. 650 (1981), and subsequent similar decisions 426

Veterans Administration funding fee

The Veterans Administration (VA) questions whether the VA funding fee, consisting of one-half of 1 percent of the amount of a loan guaranteed or insured by the VA, required under the Omnibus Budget Reconciliation Act of 1982, is reimbursable under para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended. We hold that the funding fee is not reimbursable under FTR para. 2-6.2d because the fee constitutes a finance charge under Regulation Z (12 C.F.R. 226.4 (1982)) 456

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